No. _____

In The
Supreme Court of the United States

SEVEN UP PETE VENTURE, an Arizona General Partnership, d/b/a SEVEN UP PETE JOINT VENTURE, CANYON RESOURCES CORPORATION, a Delaware Corporation, JEAN MUIR, DR. IRENE HUNTER, DAVID MUIR, ALICE CANFIELD, TONY PALAORO, JUNE E. ROTHE-BARNESON, AMAZON MINING COMPANY, a Montana Partnership, PAUL ANTONIOLI, STEPHEN ANTONIOLI, and JAMES E. HOSKINS,

Petitioners,

v.

THE STATE OF MONTANA,

Respondent.

On Petition for Writ of Certiorari to the Montana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether real property interests and State Mineral Leases, which carried with them an opportunity to seek a mining permit, are "property" protected under the Takings Clause.

2. Whether the heightened constitutional scrutiny required under the Contracts Clause where a State law impairs a State's own contracts may be avoided if the State denies that the impairment was in its financial self-interest.

PARTIES TO THE PROCEEDING

Petitioners and Respondent are identified in the case caption. Additionally, parties that intervened in the state court proceedings as defendants and respondents were the: Montana Environmental Information Center, Montanans for Common Sense Mining Laws-for-I-137, Big Blackfoot Chapter of Trout Unlimited, and Mineral Policy Center.

RULE 29.6 STATEMENT

Petitioner Seven Up Pete Venture ("Venture") is an Arizona general partnership owned by Canyon Resources Corp. ("Canyon") and CR Montana Corp. Canyon owns a 36.125 percent interest and CR Montana Corp. owns a 63.875 percent interest in the Venture. Canyon is a publicly-traded corporation and CR Montana Corp. is Canyon's wholly-owned subsidiary.

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The Montana Supreme Court decision (Pet. App. 1a-39a) is reported at 114 P.3d 1009. The decisions of the state district court (Pet. App. 40a-65a and 66a-88a) are unreported.

JURISDICTION

The Montana Supreme Court decided this case on June 8, 2005. On August 8, 2005, Justice O'Connor granted Application No. 05A133 and extended the time for filing a certiorari petition to and including November 4, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment, incorporated and made binding upon States by the Fourteenth Amendment, provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Contracts Clause provides that "No State shall ... pass any ... Law impairing the Obligation of Contracts...." U.S. Const. Art. I, § 10.

STATEMENT

This case arises from an unforeseeable initiative that established a "first in the nation, statewide ban of the one mining method admittedly contemplated by" Petitioners and the State when they signed mining leases. Pet. App. 25a ¶ 44. Petitioners "invested more than $70 million and expected to reap millions in return" from these leases that (along with other properties owned by Petitioners) are "now worthless" as a result of this unprecedented ban. Pet. App. 23a ¶ 42. The Montana Supreme Court held that Petitioners had no protected property interests worthy of compensation.

1. Petitioners include the Seven Up Pete Venture ("Venture"), which held State Mineral Leases dating back to 1986. Pet. App. 4a ¶ 8. Petitioners also have private holdings, including real property (fee interests in the surface estate) and mineral ownership, in Montana. Id.

The lands encompassed by these leases and private holdings are known as the McDonald Project, the Keep Cool Project, and the Seven Up Pete Project. The McDonald Project alone contains some 9 million ounces of gold and 20 million ounces of silver discovered by the Venture. More than half these minerals could be recovered profitably through surface mining using cyanide heap leaching to separate precious metals from the ore. Pet. App. 4a-5a ¶ 8.

The Montana Supreme Court explained that "mining based upon cyanide heap leaching has always been legal in Montana, and, in fact, the country at large." Pet. App. 25a ¶ 44. The mineral leases entered into between the Venture and the State accordingly "contemplated" that the necessary environmental permits would be based on mining that used the cyanide heap leaching method. Id. The Venture "invested more than $70 million and expected to reap millions in return" from those leases. Pet. App. 23a ¶ 42.

In 1994, as contemplated by the leases, the Venture sought environmental permits to construct and operate a surface mine using cyanide leaching. Pet. App. 6a ¶ 12. The Venture dealt with the Montana Department of Environmental Quality (DEQ) and its predecessor, and with the Department of Natural Resources and Conservation (DNRC). Pet. App. 6a-7a ¶¶ 12-13. The normal 60-day time limit for decision was extended and the permitting process was ongoing throughout the 1990s except for some months in 1998 when a stop-work order was issued. Pet. App. 7a ¶ 13. The Venture made all past-due payments in December 1998. Pet. App. 7a ¶ 15.

2. In November 1998, the Montana electorate passed an unprecedented initiative ("I-137") prohibiting open-pit mining for gold and silver using cyanide leaching. Pet. App. 3a-4a ¶ 7. I-137, subsequently codified as Mont. Code. Ann. § 82-4-390, took effect immediately but exempted mines already operating under existing permits. Pet. App. 3a-4a ¶ 7 (quoting statute). The Venture's State Mineral Leases were then in effect but a permit had not yet been issued. Accordingly, I-137 applied to the Venture and other Petitioners. Pet. App. 7a ¶ 14.

When I-137 took effect, fifteen months still remained on the Venture's State Mineral Leases. I-137, however, precluded the historically-permissible type of mining contemplated by the leases. Accordingly, in February 2000, the State DNRC notified the Venture that the leases had terminated. It explained, among other things, that the Venture had failed to submit a revised proposal comporting with I-137 as then codified in Montana statutory law. Pet. App. 7a-8a ¶¶ 13-15.

3. In April 2000, two months after being notified that the leases had been terminated, Petitioners brought suit. The complaint alleged that Petitioners had invested more than $70 million to acquire and develop the properties and secure permits for the three mining projects. Complaint at 5 ¶ 24. It added that I-137 specifically targeted the McDonald Project in seeking to outlaw a type of mining that had been lawful and productive in Montana since the turn of the century. Id. at 6, 12 ¶¶ 29, 68. The Complaint added that "[t]here are no gold or silver recovery processes other than open-pit mining and cyanide leaching which will allow economically viable production of the gold and silver contained within the lands comprising" the three projects. Id. at 14 ¶¶ 83-84. Accordingly, Petitioners alleged that their once-valuable holdings had been reduced to "only nominal value" as a result of the enforcement of I-137. Id. at 15 ¶¶ 86-87.

4. The state district court described this case as an "epic struggle." Pet. App. 44a . It issued two separate orders – the first dismissing some claims (Pet. App. 66a-88a) and the second granting summary judgment as to the remainder (Pet. App. 40a-65a) – that together rejected all of Petitioners' challenges.

The court, in rejecting takings claims, noted that "[t]he scope of Montana's constitutional takings protections has been determined with reference to decisions interpreting federal takings protections." Pet. App. 55a-56a. It nonetheless held that Petitioners had not been deprived of constitutionally protected property because all they ever had was a right to seek permission to conduct the newly prohibited type of mining and not any right to conduct that mining. Pet. App. 56a-58a. The court held that I-137 did not substantially impair the contractual relationship between the Venture and the State because a form lease provision "put the Venture on clear notice that it could be subject to future environmental laws" such as I-137. Pet. App. 51a-53a.

5. The Montana Supreme Court affirmed. Contrary to the state district court, however, the Supreme Court "conclude[d] that the enactment of I-137 constituted a substantial impairment of the Venture's contractual relationship with the State...." Pet. App. 26a ¶ 45. The court deemed it "undisputed that a contractual relationship existed between the State and the Venture." Pet. App. 23a ¶ 42. It also did not dispute that "I-137 precludes the only economically viable use of mineral extraction for [the] project, specifically the use of cyanide leaching...." Pet. App. 10a ¶ 21. The court held that the leases could not "reasonably be construed to contemplate a first in the nation, statewide ban of the one mining method admittedly contemplated by the parties." Pet. App. 25a ¶ 44.

The Montana Supreme Court nonetheless held that Petitioners had no "property" because the State would have had discretion to deny a mining permit regardless of I-137. Pet. App. 18a-19a ¶¶ 32-33. The court emphasized that "a cognizable property interest exists only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured." Pet. App. 14a ¶ 28 (internal quotations omitted; citing Kiely Constr. LLC v. City of Red Lodge, 312 Mont. 52, 57 P.3d 836 (2002)). Because the Venture was "not assured" of a mining permit, its "'opportunity' to seek a permit" – which existed before but not after I-137 – "did not constitute a property right." Pet. App. 18a-19a ¶¶ 32-33.

The court next held that I-137 had not unconstitutionally impaired Petitioners' state mineral leases. Pet. App. 20a-31a ¶¶ 38-55. It agreed with Petitioners that "the enactment of I-137 constituted a substantial impairment of the Venture's contractual relationship with the State because it acted as a complete barrier to all future mining development using the cyanide heap leaching method." Pet. App. 26a ¶ 45. The court, however, held that this impairment was constitutional. While recognizing that heightened constitutional scrutiny is proper "when the state is a party to the contract" (Pet. App. 26a-27a ¶ 47, citing United States Trust Co. v. New Jersey, 431 U.S. 1, 25-26 (1977)), the court declined to apply such heightened scrutiny in this case. It reasoned that "though the State was a party to the contract, its [financial] interests as a contracting party were actually diminished by I-137's passage...." Pet. App. 27a ¶ 47. It then proceeded to uphold the contract impairment under a lesser "reasonableness inquiry" (id.), finding that "the State could legitimately determine that this method of mining required strict regulation, and that I-137 was reasonably related to that legitimate purpose." Pet. App. 28a ¶ 50.

REASONS FOR GRANTING THE PETITION

An unforeseeable state law rendered valueless Petitioners' real property and mineral leases that previously were worth hundreds of millions of dollars. The Montana Supreme Court held that: 1) Petitioners, though indisputably owning real property and mineral leases, had no constitutionally protected "property" because there was never any guarantee that mining permits would issue; and 2) the State's impairment of Petitioners' contracts did not require heightened scrutiny, even though the State was party to those contracts, because the impairment did not benefit the State financially. Both holdings warrant further review by this Court.[1]

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[1] As noted by the Montana Supreme Court, Petitioners had filed a parallel federal action. Pet. App. 8a ¶ 16. In an effort to preserve federal review of the federal questions, Petitioners notified the state courts that they were raising only state claims in the state case. The Montana Supreme Court, however, cited and interpreted not only state provisions but also "the Fifth and Fourteenth Amendments" and the United States Constitution's Contracts Clause (U.S. Const. Art. I, § 10) as well as federal case law decided under those provisions. E.g., Pet. App. 10a-13a, 21a-22a, 26a-27a ¶¶ 21-26, 40, 47.

The court thus appears, for purposes of this Court's certiorari jurisdiction, to have decided federal as well as state issues. Cf. New York v. Class, 475 U.S. 106, 109 (1986) (Court had jurisdiction where "[t]he opinion below makes use of both federal and New York cases in its analysis, generally citing both for the same proposition"). Accordingly, even though Petitioners did not raise federal claims below, this Court has certiorari jurisdiction. Cohen v. Cowles Media Co., 501 U.S. 663, 667 (1991) ("It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided"); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 314 n.8 (1987) ("Where the state court has considered and decided the constitutional claim, we need not consider how or when the question was raised") (citing Manhattan Life Ins. Co. v. Cohen, 234 U.S. 123, 134 (1914)).

I. THIS COURT SHOULD DECIDE WHETHER REALTY AND LEASES, WHICH PROVIDED AN OPPORTUNITY FOR MINING PERMITS, ARE "PROPERTY" PROTECTED FROM UNCOMPENSATED TAKINGS.

This Court should grant review of the first issue for three related reasons. First, by holding that Petitioners had no constitutionally protected property, the Montana Supreme Court decided an important federal question in a way that conflicts with relevant decisions of this Court. Second, in focusing exclusively upon the permit and not upon the real property and leases owned by Petitioners, the Montana Supreme Court incorrectly cited case law that reveals conflicts among federal appeals courts. Finally, the need for this Court's direct review is heightened by San Remo Hotel v. City and County of San Francisco, 125 S. Ct. 2491 (2005).

A. The Montana Supreme Court's Holding Conflicts With This Court's Decisions On An Important Federal Question Involving The Constitutional Protection Of "Property".

The issue of whether there exists a constitutionally protected property interest, "despite its state law underpinnings, is ultimately one of federal law." Town of Castle Rock v. Gonzales, 125 S. Ct. 2796, 2803 (2005). The Fifth and Fourteenth Amendments prevent States from redefining interests that have "a firm basis in traditional property law principles." Phillips v. Washington Legal Found., 524 U.S. 156, 167-68 (1998). Thus, a "State, by *ipse dixit*, may not transform private property into public property without compensation." Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980). A State transgresses constitutional limits where it "would work a critical alteration to the nature of property." Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001); see also Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030-32 (1992).

Here, Petitioners' interests include privately-owned real property (fee interests in surface estates), mineral ownership, and State Mineral Leases dating back to 1986. Pet. App. 4a ¶ 8. Those interests fall within "any traditional conception of property" (Castle Rock, 125 S. Ct. at 2809). This Court has recognized that fee ownership of surface interests in land and separate ownership of underlying minerals constitute protected property interests. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 500-01 (1987) (recognizing property interests of "either the owner of the surface or the owner of the minerals"). Likewise, "leaseholds" and "contract rights" are constitutionally protected property. See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 322 (2002) (citing cases); United States Trust Co. v. New Jersey, 431 U.S. 1, 19 n.16 (1977).

The Montana Supreme Court redefined these traditional property interests out of existence by ignoring them and focusing only upon whether Petitioners previously had a guaranteed right to mining permits. Contrary to that court, the Fifth Amendment protects property even where a permit is required to use it in a certain way. Cf. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985) (a "requirement that a person obtain a permit before engaging in certain use of his or her property does not itself 'take' the property" because "the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired"); Hodel v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264, 296-97 (1981) (federal law did not "categorically prohibit surface coal mining, it merely regulate[d] the conditions under which such operations may be conducted"). In today's world, many types of land use require some sort of permit. States should not be allowed to render property valueless by retroactively eliminating any opportunity for a permit.

Petitioners' property had substantial economic value before I-137 because there was an opportunity to apply for a permit and to have the State exercise discretion on that application. That opportunity was itself a property interest protected by federal law. Cf. Bank of America v. 203 North LaSalle Street Partnership, 526 U.S. 434, 455-56 (1999) (holding in bankruptcy case that exclusive "opportunity" should "be treated as an item of property in its own right"). See also Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-31 (1982) ("cause of action" – potential for recovery – "is a species of property protected by the Fourteenth Amendment's Due Process Clause"); Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979) ("expectancies" fostered by actions of government officials are "embodied in the concept of 'property'" protected by just compensation clause).

The Montana Supreme Court, by wrongly defining the only interest as a mining permit and by ignoring Petitioners' constitutionally protected property interests in land and leases, impermissibly allowed a total taking of the land and leases. This Court unequivocally has held that a "statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use of his land." Lucas, 505 U.S. at 1015 (emphasis and quotations omitted); see also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414-15 (1922) (state law "mak[ing] it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it"); Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074, 2081 (2005) (reaffirming the "total regulatory takings" doctrine announced in Lucas and the "watershed decision" in Mahon).

A holding that Petitioners had no protected "property" interest could be correct only if the now-proscribed use was never lawful in the first place. One leading treatise succinctly summarizes Lucas's teaching as

follows: "The right to have some economically viable use of land is also considered an 'essential' right. Laws that deprive land of all productive use are per se unconstitutional (unless the proscribed use interests were never part of the owner's title)." Jan G. Laitos, *Law of Property Rights Protection* § 5.03[A], at 5-17 (2005).

The Montana Supreme Court, however, did not suggest that the now proscribed type of mining was never part of Petitioners' title. To the contrary, "mining based upon cyanide heap leaching has always been legal in Montana, and, in fact, the country at large." Pet. App. 25a ¶ 44. Thus, when Petitioners acquired their interests, no one "contemplate[d] a first in the nation, statewide ban of the one mining method admittedly contemplated by the parties." Pet. App. 25a ¶ 44. And, the "contractual relationship" was "based on the assumption, held by all parties, that the cyanide heap method would be used." Pet. App. 25a ¶ 45.

States cannot avoid compensating total takings simply because permits were not assured prior to the taking. The prospects for permits may bear on the amount of compensation due but not on the threshold issue of whether property existed. Montana Ry. Co. v. Warren, 137 U.S. 348 (1890), held that a "mining claim" had value even though it "may be called 'only a prospect'" and that the "uncertainty" as to its actual value is not a "ground for refusing to pay the full value which it has acquired in the market by reason of its surroundings and possibilities." Id. at 352-53; accord ASARCO Inc. v. Kadish, 490 U.S. 605, 628 n.3 (1989) (difficulty of valuing mineral rights "does not defeat the existence of a 'market value' in mineral rights") (citing Montana Ry. Co. v. Warren). See also Palazzolo, 533 U.S. at 625 (compensation "will be based upon the property's fair market value ... – an inquiry which will turn, in part, on restrictions on use imposed by legitimate zoning or other regulatory limitations").

B. The Montana Supreme Court Incorrectly Cited Case Law Revealing Conflicts Among Federal Circuits Regarding When The Focus Should Be Upon The Underlying Property As Opposed To Simply A Requested Permit.

The Montana Supreme Court, in focusing exclusively upon the permit and not upon the real property and leases owned by Petitioners, mistakenly cited case law that reveals conflicts among federal appeals courts. The court cited its own prior decision in Kiely, which in turn cited several federal appellate cases. In Kiely, a developer challenged denial of approval for a proposed subdivision. While that precluded one use of the property, it did not destroy all economically viable use of the property. Accordingly, Kiely analyzed the issue not as whether the developer had a protected property interest in land (clearly it did but that interest was not taken by denying one particular use) but whether it had a protected property interest in receiving approval for the subdivision. 312 Mont. at 64, 57 P.3d at 844.

The cases cited in Kiely reveal conflicts among federal appeals courts regarding the constitutional standard governing landowner challenges to permit denials. The D.C. Circuit recently explained that "[i]n the land-use context courts have taken (at least) two different approaches for determining the existence of a property interest for substantive due process purposes." George Washington Univ. v. District of Columbia, 318 F.3d 203, 206-07 (D.C. Cir. 2003). It explained that "the Third Circuit [has] held that an ownership interest in the land qualifies," while "[o]ther circuits, including the Second, Fourth, Eighth, Tenth and Eleventh Circuits, have focused on the structure of the land-use regulatory process ... and look[ed] to the degree of discretion to be exercised by state officials in granting or withholding the relevant permission." Id. at 207 (contrasting

DeBlasio v. Zoning Bd., 53 F.3d 592, 601 (3d Cir. 1995) with RRI Realty Corp. v. Village of Southampton, 870 F.2d 911, 917 (2d Cir. 1989); Gardner v. City of Baltimore, 969 F.2d 63, 68 (4th Cir. 1992); Bituminous Materials, Inc. v. Rice County, 126 F.3d 1068, 1070 (8th Cir. 1997); Jacobs, Visconsi & Jacobs Co. v. City of Lawrence, 927 F.2d 1111 (10th Cir. 1991); and Spence v. Zimmerman, 873 F.2d 256, 258 (11th Cir. 1989)). The D.C. Circuit added that even "[w]ithin the majority there is considerable variety in the courts' formulae for how severely official discretion must be constrained" in order for there to be a property interest in a permit. 318 F.3d at 207.

The D.C. Circuit, after describing the federal circuit split on whether the constitutional focus should be on the land or the permit, made a cogent point. It wrote:

> The majority approach may seem at odds with ordinary language, in which we would say, for example, that a particular piece of land in Washington is "the property" of GW. But an all-encompassing land use regulatory system may have either replaced that "property" with a "new property" (or with several, one for each authorized class of use), or conceivably have replaced it with less than a new property (thereby, one would suppose, effecting a taking).

318 F.3d at 207. The D.C. Circuit did not resolve this circuit split because it found that the landowner had constitutionally protected property under either approach. Id.

The Montana Supreme Court, by focusing exclusively on the permits and not on Petitioners' existing land and contracts, reached a ruling in direct conflict with United Nuclear Corp. v. United States, 912 F.2d 1432 (Fed. Cir. 1990). The mining company there (United) "invested more

than $5 million in the project and presumably expected to derive substantial profits from the venture." Id. at 1436; compare Pet. App. 23a ¶ 42 (Petitioners here "invested more than $70 million and expected to reap millions in return"). The Federal Circuit, in finding an unconstitutional taking, expressly rejected the Claims Court's analysis similar to that of the Montana Supreme Court here. It held that "the property interest that is the subject of the taking claim is United's leasehold interest in the minerals, which the government took by preventing United from mining under the leases, and not the mere expectation that United would be permitted to engage in mining." 912 F.2d at 1437.

This Court should resolve the federal circuit split regarding whether and when denial of a land use permit affects a constitutionally protected property interest. See Parna A. Mehrbani, *Substantive Due Process Claims in the Land Use Context*, 35 Envtl. L. 209, 241 (2005) ("the Supreme Court should grant certiorari to one of these cases and clarify the inconsistency among the circuits that has pervaded this area of law" for more than two decades). Whatever that standard, however, there is no basis for the Montana Supreme Court's holding in this case. The federal cases cited in Kiely did not involve a total regulatory taking of traditional property, but simply involved denial of permission to use still-valuable property in one particular way. See, e.g., Gardner, 969 F.2d at 68-69 (denial of proposed housing subdivision).

Petitioners here are challenging a total taking of existing property rather than the denial of a permit. The Montana Supreme Court denied protection to the former by focusing exclusively on the latter. Contrary to that court, Petitioners plainly owned "property" – including land and contracts – entitled to constitutional protection even though a permit was required for the only economically viable use.

C. The Need For This Court's Review Is Heightened By The Decision Last Term In *San Remo*.

Review is warranted not only so that this Court can provide necessary guidance on important federal questions but also because, following last Term's San Remo decision, this Court may be the only federal forum available to decide those questions.[2] Given the uncertain availability of any other federal forum, this Court should make clear its willingness to police state courts that may have a fiscal incentive to protect state coffers at the expense of private property.

The present case provides a stark illustration of how a state court may strain to protect state coffers by denying constitutional protection to private property rights. Petitioners' land and contracts were worth hundreds of millions of dollars before an unprecedented state law destroyed their value. There is no constitutional basis for the Montana Supreme Court's holding that Petitioners' land and contracts did not amount to "property." This Court should grant certiorari to review and correct that holding, which is contrary to decisions of this Court and federal appeals courts.

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[2] Petitioners sought to reserve federal claims for review by the United States District Court for the District of Montana. See supra note 1. The federal district court previously determined that Petitioners properly reserved their claims, but it dismissed some claims as unripe and stayed the remainder of the case pending conclusion of the Montana state proceedings. After the Montana Supreme Court decision, and prior to filing of this certiorari petition, Petitioners moved to reopen the federal case. Petitioners argued that the Montana Supreme Court decision was not entitled to issue preclusive effect because Montana law was not "coextensive" with federal takings law (San Remo, 125 S. Ct. at 2501 n.18). The State defendants responded that San Remo, as well as the Eleventh Amendment, precluded federal district court review. The federal district court has not yet ruled on those contentions.

II. THIS COURT SHOULD DECIDE WHETHER HEIGHTENED SCRUTINY APPLIES TO ALL IMPAIRMENTS BY A STATE OF ITS OWN CONTRACTS.

The Montana Supreme Court recognized that I-137 substantially impaired Petitioners' State contracts. Pet. App. 26a ¶ 45. That recognition should have triggered the "heightened Contract Clause scrutiny when States abrogate their own contractual obligations." United States v. Winstar Corp., 518 U.S. 839, 876 (1996) (plurality opinion) (citing United States Trust, 431 U.S. at 26); accord Exxon Corp. v. Eagerton, 462 U.S. 176, 192 n.13 (1983) (explaining United States Trust as case that "implicated the special concerns associated with a State's impairment of its own contractual obligations"); Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400, 412-13 n.14 (1983) (referring to "the stricter standard" adopted in United States Trust where State impairs its own contracts).

A law impairing a State's own contracts may be upheld under United States Trust only "if it is reasonable and necessary to serve an important public purpose." 431 U.S. at 25. And, unlike with respect to State laws impairing private contracts, "[i]n applying this standard, ... complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." Id. at 25-26. It accordingly is not enough for a State to articulate an important public purpose advanced by a law impairing public contracts. See id. at 28 (invalidating law even though "[m]ass transportation, energy conservation, and environmental protection are goals that are important and of legitimate public concern"). Instead, it must be shown that the "impairment was both reasonable and necessary to serve the admittedly important purposes claimed by the State." Id. at 29.

United States Trust invalidated a law impairing the State's own contractual obligations because that law was neither reasonable nor necessary to serve the important purposes advanced in support of it. The law was not necessary because there were "alternative means of achieving [the State's] twin goals of discouraging automobile use and improving mass transit." Id. at 30. The Court added that "a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." Id. at 31. The law, moreover, was not reasonable because the purposes to be served by impairing the contract did "not [involve] a new development" and the contract had been entered "with full knowledge of these concerns." Id. at 31-32.

The Montana Supreme Court expressly declined to apply heightened constitutional scrutiny here (Pet. App. 27a ¶ 47) and it is apparent the State's impairment could not have survived such scrutiny. The court did not suggest that the impairment of Petitioner's contracts was necessary to protect the environment. To the contrary, the court wrote that "cyanide heap leaching has been shown to be safer than other methods" of mining. Pet. App. 27a ¶ 48. And, any claim of necessity is belied by the fact that the State's own initiative law continues to allow this type of mining where permits were issued prior to November 1998. Pet. App. 7a, 19a ¶¶ 14, 34. The most the court was able to say in support of I-137 was that, given the "acknowledged risks" and "perceived insufficiency of the current laws to protect the environment," "the State could legitimately determine that this method of mining required strict regulation, and that I-137 was reasonably related to that legitimate purpose." Pet. App. 28a ¶¶ 49-50. That type of minimal justification may satisfy the deferential standard where a State's own contracts are not the ones being impaired (Energy Reserves, 459 U.S. at 412-13 & n.14), but it falls far short of the heightened United States Trust standard.

The Montana Supreme Court declined to apply heightened scrutiny because, it reasoned, I-137 actually hurt the State financially by resulting in lost lease revenues estimated at $5 million annually. Pet. App. 27a ¶ 47. It held that heightened constitutional scrutiny is appropriate under United States Trust only where a State impairs its own contracts to further its *financial* self-interest.

It is not clear that governmental self-interest is the only reason for heightened scrutiny of a State's impairment of its own contracts. To be sure, one important justification is that "the State's self-interest is at stake." United States Trust, 431 U.S. at 26. Another justification cited by this Court, however, is "to maintain the credit of public debtors." National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co., 470 U.S. 451, 472 n. 24 (1985) (citing Lynch v. United States, 292 U.S. 571, 580 (1943)). And, a leading authority opines that "a powerful argument may be advanced that the most basic purposes of the impairment clause, as well as the notions of fairness that transcend the clause itself, point to a simple constitutional purpose: *government must keep its word*." Laurence H. Tribe, *American Constitutional Law*, § 9-10 at 619 (2d ed. 1988) (emphasis in original).

Even if self-interest is the only reason for heightened scrutiny, it is not clear that this interest must be financial in nature. This Court more broadly described governmental self-interest in a federal contract case. It wrote that "when we speak of governmental 'self-interest,' we simply mean to identify instances in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties." Winstar, 518 U.S. at 896 (plurality opinion) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960), a takings case, for the proposition that "[t]he government may not 'forc[e] some people alone to bear public burdens ... which should be borne by the public as a whole").

It accordingly has been suggested "it must be the case [that a State is acting in its self-interest for purposes of triggering heightened scrutiny] when public contracts are at issue...." Note, *Takings Law and The Contract Clause: A Takings Law Approach to Legislative Modifications of Public Contracts*, 36 Stan. L. Rev. 1447, 1457 (1984). If so, States would not be allowed, absent satisfaction of the United States Trust standard, to advance their self-interests (financial or otherwise) by impairing their own contracts through "retroactive, narrowly-directed laws." Note, *Rediscovering the Contract Clause*, 97 Harv. L. Rev. 1414, 1427 (1984); see also id. at 1429 ("the imperative that government accommodate private expectations by acting only pursuant to rules fixed and announced beforehand demands that the legislature's discretion to repudiate the state's own obligations be strictly constrained") (internal quotations omitted). On the other hand, some federal appeals courts have held, like the Montana Supreme Court, that the need for heightened scrutiny under United States Trust is limited to cases in which a State is seeking to further its "financial" or "pecuniary" self-interest. See, e.g., Mercado-Boneta v. Administracion Del Fondo De Compensacion, 125 F.3d 9, 16 (1st Cir. 1997); Linton v. Commissioner, 65 F.3d 508, 519 (6th Cir. 1995).

Assuming only a State's financial self-interest can trigger heightened scrutiny, it will often be difficult to identify whether the State is acting in whole or in part to further its financial interests distinct from some other form of self-interest. The Winstar plurality adverted to similarly difficult issues of determining whether the federal government was acting as "contractor" or "legislator" or whether those ostensibly separate roles had been "fused" (as it suspected would often be the case in "the modern regulatory state"). 518 U.S. at 893-94. Here, for example, it is simplistic to state that Montana was not acting to further its

financial self-interest. While the State did forego expected royalty payments of $5 million annually from Petitioner, I-137 allowed it to regain – without paying any compensation – Petitioners' valuable and improved lease properties containing mineral deposits worth hundreds of millions of dollars.

The interests (financial or otherwise) prompting a State to impair its own contracts thus should be evaluated not in deciding whether to apply heightened scrutiny but rather in deciding whether the impairment survives such scrutiny. There is a need for additional guidance from this Court in this important area. Cf. Jan G. Laitos, *Law of Property Rights Protection* § 2.02[C], at 2-34.1, 34.2 (2005) (explaining that while several federal court cases have found that States unconstitutionally impaired their own contracts, other "jurisdictions are loathe to find a Contracts Clause violation when there is a legitimate purpose for the change in the law that affects the state's contracts"). This Court should use the present case to consider whether United States Trust sets forth the appropriate constitutional standard for evaluating a State's impairment of its own contracts based on asserted non-financial justifications.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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November 4, 2005.

APPENDIX

No.03-154
IN THE SUPREME COURT
OF THE STATE OF MONTANA
2005 MT 146

SEVEN UP PETE VENTURE, an Arizona General Partnership, d/b/a SEVEN UP PETE JOINT VENTURE; CANYON RESOURCES CORPORATION, a Delaware corporation; JEAN MUIR; DR. IRENE HUNTER; DAVID MUIR; ALICE CANFIELD; TONY PALAORO; JUNE B. ROTH-BARNESON; AMAZON MINING COMPANY, a Montana Partnership; PAUL ANTONIOLI; STEPHEN ANTONIOLI, and JAMES B. HOSKINS,
Plaintiffs and Appellants,

v.

THE STATE OF MONTANA,
Defendant and Respondent,

MONTANA ENVIRONMENTAL INFORMATION CENTER, MONTANANS FOR COMMON SENSE MINING LAWS-FOR I-137, BIG BLACKFOOT CHAPTER OF TROUT UNLIMITED, and MINERAL POLICY CENTER,
Defendants, Intervenors and Respondents.

SEVEN UP PETE VENTURE,
Petitioner and Appellant,
v.
THE STATE OF MONTANA, acting by and through its Department of Natural Resources,
Respondent and Respondent.

APPEAL FROM: The District Court of the First Judicial District, In and For the County of Lewis and Clark, Cause No. BDV 2000-250, Honorable Jeffrey M. Sherlock, Judge

COUNSEL OF RECORD:
For Appellants:
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Denver Colorado

For Respondent:
Honorable Mike McGrath, Attorney General;
Brian M. Morris (argued), Solicitor, Helena, Montana

Tommy H. Butler, Special Assistant Attorney General, Helena, Montana (DNRC)

Ed Hayes and John North, Special Assistant Attorneys General, Helena, Montana (DEQ)

Karl Englund, Elizabeth Brennan and Jack R. Tuholske, Attorneys at Law, Missoula, Montana (Intervenors)

Argued and Submitted: October 28, 2003
Decided: June 8, 2005
Filed: _____ */s/Ed Smith*
Clerk of the Court

Justice Jim Rice delivered the Opinion of the Court.

¶1 The Seven Up Pete Venture (the Venture) appeals from the December 9, 2002, order entered by the First Judicial District Court, Lewis and Clark County, whereby the District Court granted summary judgment in favor of the

State, denied the Venture's request for judicial review, and affirmed the order of the hearing examiner dated October 26, 2000. We affirm.

¶2 We address the following issues on appeal:

¶3 Did the District Court err in concluding that the enactment of I-137 did not constitute a taking of the Venture's property rights?

¶4 Did the District Court err by not addressing the takings claims made by private parties in its order granting summary judgment?

¶5 Did the District Court err in concluding that the passage of I-137 did not substantially impair the Venture's mineral leases pursuant to the Contracts Clause?

¶6 Did the District Court err in concluding that the DNRC properly terminated the Venture's mineral leases prior to resolution of its legal challenge to I- 137?

FACTUAL AND PROCEDURAL BACKGROUND

¶7 This case arises out of the November 1998 passage of Initiative 137 (I-137) by the citizens of Montana. I-137 pertains to the use of cyanide leaching[1] for mining purposes,

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[1] According to the United States Environmental Protection Agency, cyanide leaching, also known as cyanidation, includes heap leaching which is a method that was developed to efficiently "beneficiate a variety of low-grade, oxidized gold ores." "Cyanidation uses solutions of sodium or potassium cyanide as lixiviants (leaching agents) to extract precious metals from ore." OFFICE OF SOLID WASTE, U.S. ENVIRONMENTAL PROTECTION AGENCY, NTIS ANNOUNCEMENT ISSUE: 9424, *Treatment of Cyanide Heap Leaches and Tailings* (1994).

and was subsequently codified as § 82-4-390, MCA, which provides:

> **Cyanide heap and vat leach open-pit gold and silver mining prohibited.**
>
> (1) Open-pit mining for gold or silver using heap leaching or vat leaching with cyanide ore-processing reagents is prohibited except as described in subsection (2).
>
> (2) A mine described in this section operating on November 3, 1998, may continue operating under its existing operating permit or any amended permit that is necessary for the continued operation of the mine.

¶8 In 1986, the State of Montana leased six state properties for mining purposes (the Mineral Leases) to Western Energy Company. The Mineral Leases were located near Lincoln, Montana, and covered approximately 3,000 acres. In 1991 the Venture,[2] the principal plaintiff in this action, succeeded to Western Energy's interest in the Mineral Leases. The remaining eight individual plaintiffs (collectively the "individual plaintiffs"), the Amazon Mining Company and Canyon Resources Corporation have surface and mineral interests in the general vicinity of Lincoln which were also affected by I-137. The land encompassed by the Venture's Mineral Leases and private holdings, including the remaining plaintiffs' private holdings, are respectively known as the "McDonald Project," the "Keep Cool Prospect," and the "Seven Up Pete Project." The McDonald Project is the largest of the areas at issue and is where the Venture discovered roughly 9 million ounces of gold, and 20

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[2] The Venture is an Arizona general partnership owned between Canyon Resources Corporation, the owner of a 36.125 percent interest, and CR Montana Corporation, the owner of a 63.875 percent interest. CR Montana Corporation is a wholly-owned subsidiary of Canyon Resources Corporation.

million ounces of silver, approximately half of which could profitably be recovered and sold by means of a surface mine combined with cyanide leaching of the ore.

¶9 Each Mineral Lease contained a ten-year primary lease term which was to run continually thereafter, so long as "minerals . . . are being produced in paying quantities from said premises, the royalties and rents . . . are being paid, and all other obligations are fully kept and performed." In addition, paragraph 7 of the Mineral Leases stipulated that, "[t]he lessee shall fully comply with all applicable state and federal laws, rules and regulations, including but not limited to those concerning safety, environmental protection and reclamation. The lessee shall conduct and reclaim the operation in accordance with the performance and reclamation standards of applicable mine reclamation laws." The Mineral Leases also incorporated an Attachment which provided that "no activities shall occur on the tract until an Operating Plan or Amendments have been approved [by the State]."

¶10 In 1992, the Venture commenced discussions with the State, acting through the Department of State Lands (DSL), about the acquisition of an operating permit which was required for mining and mineral processing activities pursuant to the Montana Metal Mine Reclamation Act (MMRA). Additionally, on November 1, 1993, the Venture entered a Memorandum of Agreement (MOA) with the State regarding preparation of an environmental impact statement (EIS)[3] for the McDonald Project, a large scale undertaking which consequently turned the preparation of the EIS into a

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[3] The Montana Environmental Policy Act requires environmental impact statements for activities that, among other things, "significantly affect[] the quality of the human environment." Section 75-1-201(1)(b)(iv), MCA.

colossal task. The MOA recited that, "[t]he proposed Project would utilize . . . heap leaching to extract gold, silver, and other trace metals from ore," and provided guidance for preparation of the EIS.

¶11 Because of the Venture's growing uncertainty as to whether it had sufficient time to complete the operating permit application process and obtain the State's approval within the primary lease term of ten years, which was set to expire in 1996, the Venture entered into a Mineral Lease Amendment Agreement (the Lease Amendment) with the State on August 26, 1994, to extend the primary lease term. The Lease Amendment tolled the running of the seventeen months which then remained on the primary lease term, on the condition that the Venture "actively pursue" an operating permit. The Lease Amendment also provided that "[e]xcept as expressly amended hereby, the Mineral Leases shall remain in full force and effect according to their terms."

¶12 On November 21, 1994, the Venture submitted an application for an operating permit to the DSL[4] with a proposal to construct and operate the McDonald Project as a surface mine combined with cyanide leaching for gold and silver. The State had sixty days to render a decision pursuant to § 82-4-337, MCA. However, the sixty-day deadline was extended by the parties by various agreements, which ultimately extended the decisional deadline to January 31, 2000. As the environmental review process progressed, the parties also executed a series of contract modifications pertaining to the McDonald Project EIS. However, none of the modifications released the Venture from its obligations set forth in the Mineral Leases.

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[4] As part of an executive agency reorganization in 1996, the Department of Environmental Quality (DEQ) assumed the DSL's responsibilities under MMRA. Thus, the Venture's subsequent exchanges with the State regarding acquisition of the operating permit were with the DEQ.

¶13 On July 2, 1998, the Department of Environmental Quality (DEQ) issued a stop-work order on the McDonald Project EIS because of the Venture's failure to pay fees relating to third-party EIS services. The Venture fell further into arrears by failing to make monthly invoice payments to the DEQ from July 1998 to December 1998. As a result, the Department of Natural Resources and Conservation (DNRC) notified the Venture by letter in September 1998 that, because of the issuance of the DEQ stop-work order on the EIS, the time extension granted to the Venture for purposes of obtaining the operating permit was suspended, and the remaining unexpired primary term of seventeen months would begin to run for each of the Mineral Leases. The DNRC also informed the Venture that the Mineral Leases would terminate on their own accord on February 23, 2000, unless the Venture reactivated the permitting process, which would re-toll the running of any remaining unexpired primary terms in the Mineral Leases.

¶14 Meanwhile, in November 1998, Montana became the first state to prohibit open-pit mining for gold and silver using cyanide heap leaching by the passage of I-137, subsequently codified as § 82-4-390, MCA. I-137 took effect immediately, but expressly exempted mines operating under an existing permit as of November 3, 1998. Although its Mineral Leases were in effect, the Venture did not have an existing operating permit and was therefore not exempted from the facial application of I-137.

¶15 On December 31, 1998, the Venture paid all past-due EIS invoices from the DEQ. However, on February 24, 2000, the DNRC notified the Venture by letter that the permitting process had not been reactivated because of "the [Venture's] failure to diligently pursue acquisition of a permit under Montana's Metal Mine Reclamation Act," and that such cessation of the permitting process constituted a

material breach of the August 26, 1994, Lease Amendment. The DNRC explained that the permitting process was not reactivated because the Venture failed to provide a revised MOA that included an acceptable standing account balance, failed to submit a revised proposal for its operating and reclamation plan to comport with § 82-4-390, MCA, failed to produce minerals in paying quantities, and failed to remit any mineral royalties to the State. Consequently, the DNRC advised the Venture that its six Mineral Leases terminated on their own accord on February 23, 2000. The Venture's subsequent administrative appeal regarding the DNRC's lease termination was rejected by the DNRC's Director.

¶16 On April 11, 2000, the Venture, individual plaintiffs, the Amazon Mining Company, and the Canyon Resources Corporation (collectively "the Plaintiffs") filed a complaint in the First Judicial District Court, Lewis and Clark County, alleging twelve separate counts, and later added two counts in an amended complaint.[5] On the same day, the Plaintiffs also filed a complaint in the United States District Court for the District of Montana. The United States District Court subsequently dismissed the Plaintiffs' takings claims on ripeness grounds, but without prejudice, and stayed the proceedings on their federal claims because proceedings were pending in the state district court.

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[5] The 14 counts included: (1) I-137 is unenforceable for failure to meet statutory requirements; (2) substantive due process; (3) equal protection; (4) impairment of obligation of contracts; (5) in excess of limits on state's police powers; (6) permanent taking - the Venture; (7) permanent taking - Canyon Resources Corporation; (8) permanent taking - individual plaintiffs, Amazon Mining Company, and the Venture; (9) temporary taking - McDonald Project and the Venture; (10) temporary taking - McDonald Project and Canyon Resources Corporation; (11) breach of contract; (12) breach of implied covenant of good faith and fair dealing; (13) petition for judicial review; and (14) declaratory judgment - specific performance of the leases.

¶17 On November 1, 2001, the District Court issued an order granting the State's motion for summary judgment on counts two (substantive due process) and three (equal protection), and granting the State's motion to dismiss counts one (statutory requirements) and five (police powers). The District Court granted the State's motion for summary judgment on the remaining counts in a separate order on December 9, 2002, which included the Venture's request for judicial review of the DNRC's administrative decision upholding the termination of its Mineral Leases. The Plaintiffs appeal only that portion of the District Court's December 9, 2002, order denying its takings, contract impairment, and lease termination claims.

STANDARD OF REVIEW

¶18 When resolution of an issue involves a question of constitutional law, this Court's review of the, district court's interpretation of the law is plenary. *State v. Price*, 2002 MT 229, ¶ 27, 311 Mont. 439, ¶ 27, 57 P.3d 42, ¶ 27.

¶19 This Court's review of a district court's grant or denial of a motion for summary judgment is *de novo*. *Watkins Trust v. Lacosta*, 2004 MT 144, ¶ 16, 321 Mont. 432, ¶ 16, 92 P.3d 620, ¶ 16. Thus, we apply the same Rule 56, M.R.Civ.P., criteria as applied by the district court. *Peyatt v. Moore*, 2004 MT 341, ¶ 13, 324 Mont. 249, ¶ 13, 102 P.3d 535, ¶ 13. Summary judgment is proper only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Lacosta*, ¶ 16 (citing Rule 56(c), M.R.Civ.P.).

DISCUSSION

¶20 **Did the District Court err in concluding that the enactment of I-137 did not constitute a taking of the Venture's property rights?**

¶21 The Venture argues that I-137 effectuated a regulatory taking of its property rights without compensation because, "while property may be regulated to a certain extent, if [the] regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, (1922), 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322, 326. The Venture asserts that because I-137 precludes the only economically viable use of mineral extraction for its project, specifically the use of cyanide leaching, there has been a categorical regulatory taking pursuant to the holding in *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798. In *Lucas*, the United States Supreme Court established the principle that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas*, 505 U.S. at 1019, 112 S.Ct. at 2895, 120 L.Ed.2d at 815.

¶22 The Venture emphasizes that it is not contending it had a vested right to mine with cyanide, but that it had a property right in "the opportunity for a favorable ruling on its mining permit application" which existed prior to the passage of I-137. The Venture offers that this "opportunity" is a constitutionally protected property right that became obsolete after the passage of I-137. The Venture explains that contract rights and leases are forms of property, and as such, when taken for a public purpose, require payment of just compensation. The Venture notes that the United States Supreme Court in *Mobil Oil Exploration & Producing Southeast, Inc. v. United States* (2000), 530 U.S. 604, 120 S.Ct. 2423, 147 L.Ed.2d 528, held that leases can provide valuable rights that may "amount[] primarily to an *opportunity* to try to obtain . . . development rights." *Mobil Oil*, 530 U.S. at 620, 120 S.Ct. at 2436, 147 L.Ed.2d at 542. Therefore, the Venture claims it is entitled to just

compensation to be measured by the value of the Mineral Leases before the passage of I-137, taking into account the possibility that a permit might have been denied.

¶23 The State responds by arguing that I-137 did not cause a taking of any property interest held by the Venture because the Mineral Leases and Lease Amendment did not guarantee that the Venture would be permitted to mine gold or silver using the cyanidation process. The State explains that the Mineral Leases contain clauses that directly condition the Venture's mining rights on the acquisition of an operating permit, which the Venture failed to acquire. The State notes that paragraph 7 in the Mineral Leases also conditioned the Venture's development of the mineral estate upon the Venture's compliance with all applicable state and federal laws, rules, arid regulations. Consequently, the State claims that because the Venture lacked the requisite operating permit to mine using cyanide, it did not have an established property right. Citing to *Reeves v. United States* (2002), 54 Fed. Cl. 652[6], the State also offers that "[e]ven with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties." *Reeves*, 54 Fed. Cl. at 672 (citing *United States v. Locke* (1985), 471 U.S. 84, 104, 105 S.Ct. 1785, 1797, 85 L.Ed.2d 64, 82).

¶24 The State notes that the I-137 prohibitions did not apply to existing operating permits allowing use of cyanide

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[6] In *Reeves*, the Court of Federal Claims rejected a mining company's Fifth Amendment takings claim that the President's designation of land as a national monument on which it held validly staked, unpatented mining claims, worked a regulatory taking of its property interest. *Reeves*, 54 Fed. Cl. at 673-74.

leaching as of November 3, 1998; it was only because the Venture did not have an existing permit as of that date, that it did not come within the exemption. Further, the State argues that I-137 does not prohibit all mining techniques and thereby eliminate all economically beneficial uses of the land, but rather only prohibits the use of the cyanide leaching method to process ore extracted from an open-pit. We note, however, that the State conceded in the District Court, for purposes of summary judgment, that all parties understood that their agreement contemplated that the Venture's permit application was premised on use of the cyanide heap leaching as the method of extraction.

¶25 Article II, Section 17, of the Montana Constitution affords protection of property by providing that "[n]o person shall be deprived of life, liberty, or property without due process of law." The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

¶26 The guarantees of the Fifth and Fourteenth Amendments "'apply only when a constitutionally protected . . . property interest is at stake.'" *Kiely Constr. L.L.C. v. City of Red Lodge*, 2002 MT 241, ¶ 23, 312 Mont. 52, ¶ 23, 57 P.3d 836, ¶ 23 (citing *Tellis v. Godinez* (9th Cir. 1993), 5 F.3d 1314, 1316). *Cf. State ex rel. Riley v. District Court* (1937), 103 Mont. 576, 586, 64 P.2d 115, 120 ("A public office is that of a public trust or agency created for the benefit of the people . . . in which the incumbent has not a property right; not being property, a deprivation of . . . his office is not the taking of property . . . ."). Additionally, "even if government action might otherwise constitute a taking of property, it will not if it is shown that what the government prohibits does not amount to a private property right in the first place. Said another way, an owner cannot

maintain an action for loss of a property right that it . . . [never had]." *Kinross Copper Corp. v. State of Oregon* (Or. 1999), 981 P.2d 833, 836-37. *See also Kiely*, ¶ 23. Property interests, while not created by the Constitution, are created and "defined by existing rules or understandings that stem from an independent source, such as state law." *Kiely*, ¶ 24 (citing *Board of Regents v. Roth* (1972), 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548, 561). Under Montana law, "[t]he threshold question of whether one has a protected property interest must . . . be answered in the affirmative before the question of whether one was deprived of that interest may be submitted to" the trier of fact. *Kiely*, ¶ 25.

¶27 The Legislature mandated, pursuant to the MMRA, that an operating permit be obtained before mining may be pursued:

> A person may not engage in mining, ore processing . . . construct or operate a hard-rock mill, use cyanide ore-processing reagents or other metal leaching solvents or reagents, or disturb land in anticipation of those activities in the state without first obtaining an operating permit from the department.[7]

Section 82-4-335(l), MCA. Likewise, this Court has held, pursuant to § 82-4-335(1), MCA, that a lessee of state lands has no right to engage in mining operations until an operating permit has been obtained. *Kadillak v. Anaconda Co.* (1979), 184 Mont. 127, 138-40, 602 P.2d 147, 154-55.

¶28 Clearly, the right to mine is conditioned upon the acquisition of an operating permit. In determining whether there is a property right in the "opportunity" to obtain a

[7] The "department" refers to the DEQ.

permit, we find further guidance in our decision in *Kiely*. There, we cited to *Gardner v. Baltimore Mayor and City Council* (4th Cir. 1992), 969 F.2d 63, 68, for the proposition that "a property-holder possesses a legitimate claim of entitlement to a permit or approval . . . [if] under state and municipal law, the local agency lacks all discretion to deny issuance of the permit or to withhold its approval . . . . [U]nder this standard, a cognizable property interest exists '*only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured.*'" *Kiely*, ¶ 28 (citing *Gardner*, 969 F.2d at 68). Thus, we look to the decision-maker's degree of discretion and not to the probability of the decision's favorable outcome. *Kiely*, ¶ 29.

¶29 In analyzing whether the State had discretion in the issuance of an operating permit to the Venture, we begin by looking to the DEQ administrative regulations governing the issuance of operating permits. Rule 17.24.122, ARM (2004), provides that, "[t]he department may approve the assignment of a permit if the requirements of . . . this rule are met."[8] Also, Rule 17.24.404, ARM (2004),[9] provides that:

> (1) The [DEQ] shall review each administratively complete application . . . and

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[8] Rule 17.24.122, ARM, was originally enacted in 1994 as Rule 26.4.107F under the purview of the DSL. 21 Mont. Admin. Reg. 2952 (November 10, 1994). Due to an administrative re-organization in 1996, it was re-numbered as 17.24.122, and delegated under the authority of the DEQ.

[9] Rule 17.24.404, ARM, was originally enacted in 1980 as Rule 26.4.404 under the purview of the DSL. 5 Mont. Admin. Reg. 725 (March 13, 1980). Due to an administrative re-organization in 1996, it was re-numbered as 17.24.404, and delegated under the authority of the DEQ.

determine the acceptability of the application . . . .[10]

(2)(a) If the application is not acceptable, the [DEQ] shall notify the applicant in writing, setting forth the reasons why it is not acceptable. The [DEQ] may propose modifications, delete areas, or reject the entire application.[11]

. . . .

(4) The [DEQ] shall determine the adequacy of the fish and wildlife plan . . . .[12]

(5) The [DEQ] shall assure that:

. . . .

(c) coordination of the review process for cultural resource compliance is carried out in accordance with the provisions of the Archeological Resources Protection Act . . . and

(d) the permit review process is coordinated with applicable requirements of the Endangered Species Act of 1973 . . . the Fish and Wildlife Coordination Act . . . the Migratory Bird Treaty Act . . . the National

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[10] This provision was enacted in 1980. 5 Mont. Admin. Reg. 725 (March 13, 1980). It was amended in 1988. 13 Mont. Admin. Reg. 1365 (July 14, 1988).

[11] This provision was added in 1988. 13 Mont. Admin. Reg. 1365 (July 14, 1988). In 1998, the numbering was adjusted, but the text remained unchanged. 22 Mont. Admin. Reg. 3008 (November 19, 1998). In 1999, the numbering was adjusted, but the text remained unchanged. 16 Mont. Admin. Reg. 1783 (August 26, 1999).

[12] This provision was enacted in 1980, and was not subsequently amended since that time. 5 Mont. Admin. Reg. 725 (March 13, 1980).

> Historic Preservation Act . . . and the Bald Eagle Protection Act.[13]
> (6) If the [DEQ] decides to approve the application it shall require that the applicant file the performance bond or provide other equivalent guarantee before the permit is issued.[14]
> . . . .
> (10) The [DEQ] may not approve an application if the mining and reclamation would be inconsistent with other such operations or proposed or anticipated operations in areas adjacent to the proposed permit area.[15]

¶30 The Mineral Leases contain the following discretionary language:

> The Department shall not approve the Plan until the Lessee has met reasonable requirements to prevent soil erosion, air and water pollution, and to prevent unacceptable impacts to vegetation, wildlife, wildlife habitat, fisheries, visual qualities and other

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[13] Subsections (c) and (d) were added in 1989, and have not been subsequently amended. 17 Mont. Admin. Reg. 1328 (September 14, 1989).

[14] This provision was enacted in 1980. 5 Mont. Admin. Reg. 725 (March 13, 1980). In 1988, the numbering was adjusted, but the text remained unchanged. 13 Mont. Admin. Reg. 1366 (July 14, 1988).

[15] This provision became effective on April 1, 1980. 5 Mont. Admin. Reg. 725 (March 13, 1980). In 1988, the numbering was adjusted, but the text remained unchanged. 13 Mont. Admin. Reg. 1366 (July 14, 1988). In 1994, the numbering was adjusted, but the text remained unchanged. 17 Mont. Admin. Reg. 2502 (September 8, 1994). This provision was repealed on October 22, 2004.

> resources and to reclaim any land disturbed by the activities. No work will be conducted without written approval of the Operating Plan.
>
> Surface activity may be denied on all or portions of any tract, if the Commissioner determines, in writing, after an opportunity for an informal hearing with the lessee that the proposed surface activity will be detrimental to Trust resources . . . .

¶31 Additionally, the Mineral Leases and Lease Amendment make clear that the Venture was obligated by contract to secure an operating permit subject to all environmental regulations and conditioned upon the completion of certain regulatory requirements as prescribed by the State, before it would acquire any "right" to mine gold and silver using cyanidation or any other process of mineral extraction. The following relevant clauses illustrate the conditional language found in both the Mineral Leases and Lease Amendment.

> **Paragraph 2 (Mineral Leases: Attachment "A")** - The Department shall not approve the Plan until [the Venture] has met reasonable requirements . . . No work will be conducted without written approval of the Operating Plan.
>
> **Paragraph 7 (Mineral Leases)** - The [Venture] shall fully comply with all applicable state and federal laws, rules and regulations, including but not limited to those concerning safety, environmental protection and reclamation.

> **Number 4 (Lease Amendment)** - [P]rovided that the [Venture] has first procured the applicable Permits under the Metal Mine Reclamation Act, any parcel of the Leased Premises may be used by the [Venture] for any Mining purpose . . . .
>
> **Paragraph 9 (Lease Amendment: Appendix A - Definitions)** - "Permits" means all federal, state and local licenses, permits, consents, authorizations, orders or clearances required for Development or Production.

¶32 The discretionary language set forth in the DEQ administrative regulations, Mineral Leases, and Lease Amendment, in addition to the absence of any language limiting the exercise of DEQ's discretion, demonstrates that the DEQ had substantial discretion regarding issuance of an operating permit pursuant to § 82-4-335, MCA. Without question, the DEQ's discretion was not "so narrowly circumscribed that approval . . . [was] virtually assured," *Kiely*, ¶ 28. We conclude, therefore, that the Venture's "opportunity" to seek a permit, which required convincing the State that this cyanide leaching project was appropriate, did not constitute a property right. The State had wide discretion to reject the Venture's permit application, even without the enactment of I-137.

¶33 Furthermore, the Venture had not secured an operating permit as required by the Mineral Leases, Lease Amendment, and § 82-4-335(1), MCA. Thus, the passage of I-137 did not take away any existing permits or halt any on-going mine operations related to the Venture's projects. Because the Venture had not obtained the requisite operating permit, it likewise had not obtained a right to mine. Moreover, it was not assured of ever obtaining such a right. Therefore, we conclude that the enactment of I-137 did not

constitute an unconstitutional taking. Because the analysis in *Lucas* applies only if there is an established property right, we conclude it is not applicable here.

¶34 The Venture relies on *State ex rel. R.T.G., Inc. v. State* (Ohio 2002), 780 N.E.2d 998, to support its contention that I-137 constitutes an unconstitutional restriction upon its mining proposal which renders its investment valueless. In *R.T.G.*, the State of Ohio issued a mining permit to plaintiffs and thereafter designated the land unfit for mining, following the plaintiffs' investment of over $100,000 in the land pursuant to the issuance of the permit. However, that is a very different situation. Had the Venture, like the *R.T.G.* plaintiffs, obtained an operating permit prior to the regulatory change, it could have continued to use cyanide leaching because mines operating with existing permits were exempted from I-137's application. Thus, we conclude that *R.T.G.* is not inconsistent with our holding here.

¶35 **Did the District Court err by not addressing the takings claims made by private parties in its order granting summary judgment?**

¶36 The Plaintiffs assert that the District Court failed to consider the takings claims made in counts six through ten of their amended complaint which were based on private mineral leases or fee ownership of minerals held by the individual plaintiffs, including the ownership interests of plaintiff Canyon Resource Corporation. The Plaintiffs argue that the District Court considered *only* the takings claims based specifically on the Venture's Mineral Leases with the State, but nevertheless dismissed all remaining claims, including those unrelated to the Mineral Leases, without specifying a rationale. Plaintiffs contend that, in so doing, the District Court violated Rule 52(a), M.R.Civ.P., which provides that "any order . . . granting a motion under Rules

12 or 56 . . . shall specify the grounds therefor with sufficient particularity."

¶37 The Plaintiffs, in counts six through eight, claimed that I-137 constituted a permanent taking of their property. Similarly, in counts nine and ten, the Plaintiffs alleged that I-137 constituted a temporary taking of their property. Thus, the District Court's analysis for counts six through ten hinged on the overall question of whether I-137 constituted a taking of the Plaintiffs' properties. After the District Court conducted a thorough takings analysis, it concluded that I-137 did not constitute a taking "of any property right that *Plaintiffs* owned in the mineral leases," and held that the State was entitled to summary judgment on "Counts Six, Seven, Eight, Nine, and Ten." (Emphasis added.) While the District Court did not specifically reference each individual plaintiff, its conclusion that I-137 did not constitute a taking resolves the issues raised in counts six through ten in Plaintiffs' amended complaint. Therefore, we conclude that the District Court sufficiently addressed the takings claims involving those plaintiffs who similarly claimed that I-137 constituted a taking, but who had no interests in the Mineral Leases.

¶38 **Did the District Court err in concluding that the passage of I-137 did not substantially impair the Venture's mineral leases pursuant to the Contracts Clause?**

¶39 The District Court concluded that the Venture was "on notice" that new regulations may pass in the future since the mining industry is heavily regulated in Montana, and because the Venture was a "most sophisticated party, and could have negotiated some sort of protection for itself." The District Court concluded that the Venture agreed to be bound by all future environmental regulations pursuant to paragraph

7 of the Mineral Leases (hereinafter "paragraph 7"), which provided that:

> The [Venture] shall fully comply with all applicable state and federal laws, rules and regulations, including but not limited to those concerning safety, environmental protection and reclamation.

Additionally, the District Court reasoned that none of the written documents between the parties obligated the State to allow cyanide heap leaching in an open-pit on the land subject to the Mineral Leases, and therefore determined "the impairment was not of the parties' contract, but was of the Venture's desires." Thus, the District Court disposed of the Venture's Contracts Clause claims by finding no substantial impairment of the contractual relationship since there was no contractual obligation on the part of the State to allow open-pit mining using the cyanide heap leaching process.

¶40 The Montana Constitution provides that "[n]o ex post facto law nor any law impairing the obligation of contracts . . . shall be passed by the legislature." Art. II, Sec. 31, Mont. Const. Similarly, the United States Constitution states that "[n]o state shall . . . pass any . . . law impairing the obligation of contracts." U.S. Const., Art. I, § 10. This Court has not given an absolute interpretation of the Contracts Clause, but has instead concluded that "private contracts must give way before a legitimate exercise of [the state's] police power," and that business conducted in Montana is "subject to the retained power of the state to protect public welfare." *Western Energy Co. v. Genie Land Co.* (1987), 227 Mont. 74, 82, 737 P.2d 478, 483. Likewise, "an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose." *City of Billings v. County Water Dist.* (1997), 281 Mont. 219, 229, 935 P.2d 246, 252. However, we have also acknowledged

that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate [when] the State's self-interest is at stake." *City of Billings*, 281 Mont. at 229, 935 P,2d at 252.

¶41 These Contracts Clause principles are applied by way of a three-part test this Court employs when analyzing a Contracts Clause challenge:

> (1) Is the state law a substantial impairment to the contractual relationship;
> (2) Does the state have a significant and legitimate purpose for the law; and,
> (3) Does the law impose reasonable conditions which are reasonably related to achieving the legitimate and public purpose?

Carmichael v. Workers' Comp. Court (1988), 234 Mont. 410, 414, 763 P.2d 1122, 1125. Under the first prong of the test, we must first determine whether there is a contractual relationship, and if so, whether the law substantially impaired the contractual relationship. *General Motors Corp. v. Romein* (1992), 503 U.S. 181, 186, 112 S.Ct. 1105, 1109, 117 L. Ed.2d 328, 337.[16] In determining impairment, we will consider the extent to which the industry has been regulated in the past. *Buckman v. Montana Deaconess Hosp.* (1986), 224 Mont. 318, 326-27, 730 P.2d 380, 385. It should be noted that if we conclude there is no substantial impairment to the contractual relationship, the inquiry ends. *Neel v. First*

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[16] In *Romein*, the United States Supreme Court relied upon the Contracts Clause analysis it had employed in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.* (1983), 459 U.S. 400, 103 S.Ct. 697, 74 L.Ed.2d 569, to determine whether a state law operated as a substantial impairment to a contractual relationship. This Court has previously relied upon *Energy Reserves* for guidance regarding our Contracts Clause analysis. *See Carmichael*, 234 Mont. at 414, 763 P.2d at 1125; *Western Energy*, 227 Mont. at 83, 737 P.2d at 484; *Buckman v. Montana Deaconess Hosp.* (1986), 224 Mont 318, 326, 730 P.2d 380, 385.

Fed. Sav. & Loan Ass'n (1984), 207 Mont. 376, 391, 675 P.2d 96, 104.

¶42 It is undisputed that a contractual relationship existed between the State and the Venture. Regarding whether the law substantially impaired the contractual relationship, the Venture argues that I-137 not only impaired, but "destroyed" its Mineral Leases. The Venture takes exception to the District Court's reliance on paragraph 7, arguing that paragraph 7 merely acknowledged the State's right to "regulate," and did not authorize the State to destroy its contract entirely via subsequent legislation. The Venture explains that its contractual relationship with the State, "as a whole," including all subsequent agreements made after the Mineral Leases, indicates that the parties contemplated that the Venture would mine using the cyanide heap leaching process. As a result, the Venture contends that these agreements demonstrate that it never agreed to be bound to future laws which would completely ban the use of cyanide heap leaching process, and that I-137 therefore substantially impaired its contractual agreements. The Venture accounts its interests—for which it invested more than $70 million and expected to reap millions in return—as now worthless.

¶43 The State responds by arguing, as the District Court concluded, that I-137 did not substantially impair the contractual relationship because paragraph 7 provides that the Venture shall fully comply with "all applicable state and federal laws, rules and regulations, including but not limited to those concerning safety, environmental protection and reclamation." The State explains that one of the purposes behind I-137 is to protect the environment, and that the Venture, through paragraph 7, expressly agreed to comply with environmental regulations. The State also urges this Court to follow *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001), 86 Cal. App. 4th 534, 103 Cal. Rptr.2d 447, which held that "[a] total prohibition of

previously authorized conduct, as would occur with application of [the law causing the alleged impairment] to the [contract at issue], is not necessarily unconstitutional . . . [and that] a statute does not violate the Contract[s] Clause simply because it has the effect of restricting or even barring altogether, the performance of duties created by contracts entered into prior to its enactment. . . ." *Stop Oil*, 86 Cal App.4th at 554, 103 Cal. Rptr.2d at 461. In *Stop Oil*, the voters adopted a law in 1984 which allowed for exceptions to a complete ban on all oil exploration and production which had been in effect since 1932. The Macpherson Oil Company (Macpherson) entered into a lease agreement with the city in 1992 whereby Macpherson obtained the right to conduct oil and gas operations within the city, but also agreed to "comply with all laws, rules and regulations of the United States, of the State of California . . . and of the [city] applicable to the Lessee's operations . . . ." *Stop Oil*, 86 Cal. App.4th at 556, 103 Cal. Rptr.2d at 463. The primary issue in *Stop Oil* was whether the November 1995 passage of Proposition E, a voter initiative reestablishing a complete ban on oil exploration and production, unconstitutionally impaired Macpherson's 1992 lease agreement with the city. The *Stop Oil* court concluded that Proposition E did not constitute a substantial impairment in violation of the Contracts Clause because Macpherson lacked a vested right to continue with the project absent the necessary permits. The State urges this Court to rely on the *Stop Oil* court's reasoning and similarly conclude that there was no substantial impairment of contract because the Venture, like Macpherson, had not proceeded far enough with the proposed project to acquire a vested right and did not protect itself from subsequent regulatory changes through a development agreement. *Stop Oil*, 86 Cal. App. 4th at 558, 103 Cal. Rptr.2d at 464.

¶44 Although the State points to paragraph 7 of the agreement, under which the Venture agreed to "fully comply

with all applicable state and federal laws, rules and regulations," and argues that the contract was not substantially impaired because the Venture had agreed to comply with applicable regulations, we cannot conclude that this contract provision can reasonably be construed to contemplate a first in the nation, statewide ban of the one mining method admittedly contemplated by the parties. Indeed, to "fully comply" with I-137 under these circumstances would leave little purpose for the agreement itself. Although the *Stop Oil* court reasoned that the subject company was sophisticated and should have contractually protected itself from the possibility of the ban, the contract there had been negotiated in a regulatory environment wherein development had been *banned* for fifty-two years prior to the change in the law which permitted it. In contrast, mining based upon cyanide heap leaching has always been legal in Montana, and, in fact, the country at large. In the context of Montana's long association with mining, we cannot conclude that a party, even one considered sophisticated, could have reasonably anticipated, at the time the agreement was entered in 1986, that Montana would enact the first state ban of this form of mining twelve years later.

¶45 As noted, the State did not contest, for purposes of summary judgment, the Venture's assertion that all parties understood that their agreement contemplated that the Venture's permit application would be based upon an open-pit mine utilizing cyanide heap leaching processing of the ore. Thus, though the Venture lacked a property or contract right to use the cyanide heap leaching method, absent the requisite operating permit, the Venture's contractual relationship with the State was nonetheless based on the assumption, held by all parties, that the cyanide heap method would be used. Given that assumption, we must conclude that a regulation that banned the future use of the very method of mining upon which the contract itself was based,

substantially impaired that contract. Thus, we conclude that the enactment of I-137 constituted a substantial impairment of the Venture's contractual relationship with the State because it acted as a complete barrier to all future mining development using the cyanide heap leaching method.

¶46 The second prong of the Contracts Clause test requires this Court to determine whether the state law passed by the legislature is based on a significant and legitimate public purpose. *City of Billings*, 281 Mont. at 227-28, 935 P.2d at 251. In this regard, the Montana Constitution provides that "the right to a clean and healthful environment" is an inalienable right of every person. Art. II, Sec. 3, Mont. Const. It further requires that a clean and healthful environment shall be preserved for future generations. Art. IX, Sec. 1(1), Mont. Const. This Court has previously held that environmental regulations represent a reasonable exercise of the police power. *Western Energy*, 195 Mont. at 211, 635 P.2d at 1302. In addition, the United States Supreme Court has held that a state has a "legitimate interest in guarding against . . . environmental risks, despite the possibility that they may ultimately prove to be negligible." *Maine v. Taylor* (1986), 477 U.S. 131, 148, 106 S.Ct. 2440, 2452, 91 L.Ed.2d 110, 127. Consequently, we conclude that I-137 is based on the significant and legitimate public purpose of protecting the environment, thus satisfying the second prong of the test.

¶47 With respect to the third prong, we must determine whether the "application of [I-137] to the facts at issue here is reasonably related to achieving the legitimate and public purpose[] of [I-137]." *City of Billings*, 281 Mont. at 229, 935 P.2d at 252. As mentioned herein, we will not give "complete deference to a legislative assessment" and will apply a "heightened level of scrutiny" when the State is party to the contract or if its self-interest is at stake. *Buckman*, 224 Mont. at 327, 730 P.2d at 385 (citing *U.S Trust Co. of New*

York v. New Jersey (1977), 431 U.S. 1, 25-26, 97 S.Ct. 1505, 1519, 52 L.Ed.2d 92, 111-12).[17] However, the record reveals that the application of I-137—created and passed by the voters of Montana—did not act to benefit the State's self-interest. The passage of I-137 caused the State to forego the opportunity to receive royalty payments estimated at $5 million annually over the production life of mining operation, which was expected to be twelve years. Thus, though the State was a party to the contract, its interests as a contracting entity were actually diminished by I-137's passage, and thus, for purposes of a Contracts Clause analysis, it is not necessary to apply a heightened level of scrutiny to the Initiative. However, I-137 must nonetheless withstand the reasonableness inquiry under third prong of the test.

¶48 The Plaintiffs introduced several studies in the District Court record regarding the safety of cyanide heap leaching method. Although cyanide heap leaching has been shown to be safer than other methods, one study by a mineral processing and chemical engineering consultant indicated that "there is no question that sodium cyanide is very toxic to humans and other vertebrates."[18] Additionally, another study in the record, prepared by a metallurgical engineer, noted that "cyanide is a highly toxic chemical, either in solution or in its gaseous form."[19]

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[17] "In almost every case, the [United States Supreme Court] has held a governmental unit to its contractual obligations when it enters financial or other markets." *Energy Reserves*, 459 U.S. at 412-13, n.14, 103 S.Ct. at 705, 74 L.Ed.2d at 581-82. *See U.S. Trust Co. of New York-v. New Jersey* (1997), 431 U.S. 1, 25-28, 97 S.Ct. at 1519-21, 53 L.Ed.2dat 111-14.

[18] Terry McNulty, *Economic and Technical Analysis of Alternative Technologies for Mining and Processing of Gold/Silver Ores of the McDonald and Seven-up Pete Deposits*, August 15, 2000, at 28.

[19] Doug Halbe; *Review and Summary of Alternative Solvents for Dissolution of Gold and Silver from Ores: Chemistry. Application and Commercialization*, May 17, 2000, at 11.

¶49 Environmental concerns about the use of the cyanide heap leaching method of mining and the perceived insufficiency of the current laws to protect the environment while employing this method of mining were stated purposes of the Initiative's proponents. In the voter information pamphlet prepared for the election, the proponents stated:

> It's very simple: I-137 is about whether to allow future open-pit cyanide leach mining. The opponents argue that existing laws are strong and will protect Montanans. That is obviously not true. Just read the headlines.

MONTANA VOTER INFORMATION PAMPHLET, General Election, November 3, 1998, at 30.

¶50 In consideration of the acknowledged risks associated with the use of cyanide heap leaching, and the expressed concerns about the inadequacy of existing laws, we conclude that the State could legitimately determine that this method of mining required strict regulation, and that I-137 was reasonably related to that legitimate purpose. "It is clear that the adoption of the regulations by the state for the protection of the environment is a reasonable exercise of its police power." *Western Energy*, 195 Mont. at 211, 635 P.2d at 1302. Therefore, the third prong of the test establishes that the enactment of I-137 does not violate the Contracts Clause of the Montana Constitution.

¶51 The Venture also makes several arguments about the interpretation of paragraph 7, asserting the District Court based its order on an erroneous interpretation thereof. However, the aforementioned conclusions in regard to the effect of paragraph 7 resolve those arguments, and we will not address them individually.

¶52 Finally, the Venture asserts that *Mobil Oil* requires a different outcome because it held that government leases must be construed in a manner rendering them non-illusory, and that such leases should likewise be interpreted to avoid a result whereby a private party invests millions to "buy next to nothing" from the government. *Mobil Oil*, 530 U.S. at 616, 120 S.Ct. at 2433, 147 L.Ed.2d at 539. The Venture explains that, similar to the two oil companies in *Mobil Oil*, it did not agree to be bound by a subsequently passed law that would: (1) make its mineral leases illusory; (2) require it to waive fundamental constitutional protections; and (3) completely preclude the opportunity to try and obtain a favorable permit decision. The Venture argues that the District Court misapplied *Mobil Oil*, and erroneously construed its lease, thereby resulting in the Venture investing $70 million to buy "next to nothing"—an outcome, it argues, is inconsistent with the holding in *Mobil Oil*.

¶53 In *Mobil Oil*, the United States entered lease agreements with rights to develop and explore for oil off the North Carolina coast with two oil companies in return for up-front "bonus" payments totaling approximately $158 million, plus annual rental payments. The contracts contained conditions requiring the two oil companies to obtain exploration and development permits in accordance with regulations promulgated pursuant to *existing* statutes. The contract did not contemplate future regulations promulgated pursuant to *future* statutes. After the contracts were signed and $158 million in "bonus" payments were made, the United States Congress passed a new statute which was applied to the *Mobil Oil* leases. However, the requirements of the new statute made it impossible for the oil companies to obtain their final approvals to explore for and develop oil. The oil companies subsequently filed a breach of contract claim against the United States and sought restitution to

recover the $158 million in up-front "bonus" payments.[20] The United States Supreme Court concluded that the United States had breached its contract with the oil companies and ordered it to pay $158 million in restitution because it had broken its promise "to follow the terms of pre-existing statutes and regulations" and instead followed a newly-passed statute not in effect at the time of contracting. *Mobil Oil*, 530 U.S. at 624, 120 S. Ct. at 2438, 147 L.Ed.2d at 544. The United States Supreme Court explained that the *Mobil Oil* lease contracts specified that they were "subject to then-existing regulations and to certain future regulations[21] . . . . This explicit reference to future regulations makes it clear that the catchall provision that references 'all other applicable . . . regulations' must include *only* statutes and regulations already existing at the time of the contract." *Mobil Oil*, 530 U.S. at 616, 120 S.Ct. at 2433, 147 L.Ed.2d at 539 (emphasis added). Hence, the *Mobil Oil* leases were not subject to statutes or regulations passed subsequent to the formation of the contract. In addition, the up-front bonus payment of $158 million paid for "specific temporal restrictions" on the federal government's power to avoid subjecting the oil companies to unknown future requirements or regulations. *Mobil Oil*, 530 U.S. at 617, 120 S.Ct. at 2434, 147 L.Ed.2d at 539.

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[20] The oil companies did not seek other damages such as a refund of its annual rental payments of $250,000, or other "soft costs" associated with the permitting process.

[21] The "certain future regulations" were in reference to those regulations issued pursuant to OCSLA and §§ 302 and 303 of the Department of Energy Organization Act. The "certain future regulations" did not contemplate or include "new" or "other" legislation outside the aforementioned. *Mobil Oil*, 530 U.S. at 616, 120 S.Ct. at 2433, 147 L.Ed.2d at 539.

¶54 In contrast to the facts in *Mobil Oil*, the Venture: (1) made no extraordinary payments in exchange for special protection or limitations; (2) made no "up-front bonus payment" for which it could seek restitution, and instead made annual rental payments of approximately three dollars per acre; (3) did not bargain for language in the Mineral Leases that would protect it from potentially adverse regulations based on a future statute; and (4) sought damages for breach of contract which encompassed the "total of monies invested by it in development," including the total value of its mineral interests, whereas the oil companies in *Mobil Oil* sought restitution only as to their up-front bonus payment, *excluding* annual rental payments and other "soft costs" incurred due to the permitting process. While leases should be interpreted to avoid a result whereby a private party invests millions to "buy next to nothing" from the government, they should likewise not be construed to buy something certain when the private party, in fact, bought "a risk" with the potential of gaining something. Thus, in light of these distinguishing factors, it is clear that the Venture's reliance on *Mobil Oil* is unavailing.

¶55 In summary, we conclude that, although the District Court erred in concluding that the parties' agreement was not substantially impaired by the passage of I-137, it nonetheless correctly held that the Contracts Clause was not violated because, as set forth herein, the second and third prongs of the analysis demonstrate that I-137 was reasonably related to the legitimate and significant purpose of protecting the environment. "[A] district court's decision will not be reversed or remanded when the eventual result of the case would be the same without the error." *In re S.C.* (1994), 264 Mont. 24, 30, 869 P.2d 266, 269 (citing *In re Marriage of Cannon* (1985), 215 Mont. 272, 275, 697 P.2d 901, 903). Therefore, we affirm the District Court's holding.

¶56 **Did the District Court err in concluding that the DNRC properly terminated the Venture's mineral leases prior to resolution of its legal challenge to I-137?**

¶57 It is helpful here to recap certain facts pertaining to the termination of the Venture's Mineral Leases. On September 23, 1998, the DNRC notified the Venture by letter that its failure to satisfy certain DEQ requirements constituted a breach of the 1994 Lease Amendment, and if not cured, would cause the primary lease terms to run and ultimately expire on February 23, 2000. Additionally, the DNRC informed the Venture that, in order to re-toll the running of the last seventeen months of the primary lease term, the Venture must: (1) pay all past-due EIS invoices; and (2) execute an acceptable MOA with the DEQ regarding preparation of the EIS. Though the Venture subsequently paid all past-due EIS invoices, the DNRC determined that it had failed to actively pursue the permitting process with the DEQ. Consequently, on February 24, 2000, the DNRC notified the Venture that the primary lease term had lapsed and the Mineral Leases were thereby terminated. Two weeks later, the Venture administratively appealed that determination and on April 11, 2000, the Venture commenced litigation challenging the validity of I-137. On October 26, 2000, the DNRC's Director rejected the Venture's administrative appeal and affirmed the February 2000 termination of the Mineral Leases.

¶58 This Court determines whether an agency's decision may be reversed or modified only if the administrative findings, inferences, and conclusions are "clearly erroneous" in light of the evidence, in violation of statutory or constitutional authority, or an abuse of the exercise of discretion. Section 2-4-704, MCA. This Court applies a three-part test to determine whether an agency's findings are clearly erroneous: (1) after review of the record, the findings must be supported by substantial evidence; (2) if there is

substantial evidence to support the findings, the Court will determine whether the agency misapprehended the effect of the evidence; and (3) even assuming the first two requirements are met, the Court may conclude that a finding is clearly erroneous when, in spite of evidence supporting it, a review of the record "leaves the [C]ourt with the definite and firm conviction that a mistake has been committed." *Hughes v. Mont. Bd. of Med. Examiners*, 2003 MT 305, ¶ 11, 318 Mont. 181, ¶ 11, 80 P.3d 415, ¶ 11. This Court will review a state agency's conclusions of law to determine whether the agency's interpretation of law is correct. *Williams Insulation Co. v. Dep't of Labor & Indus.*, 2003 MT 72, ¶ 22, 314 Mont. 523, ¶ 22, 67 P.3d 262, ¶ 22.

¶59 The Venture argues that the DNRC erred when it determined that the Venture had failed to pursue the permitting process and terminated the Mineral Leases. The Venture asserts that the DNRC should have extended the primary terms of the Mineral Leases to include the time necessary to seek the invalidation of I-137, since such pursuit acted as an "authorization, order or clearance required for the Development or Production" under the definition of "Permit"[22] in the Lease Amendment. The Venture claims that, after it paid all its past-due EIS invoices by December 31, 1998, it actively pursued the permitting process by seeking judicial invalidation of I-137, and therefore, the conclusion reached by the DNRC and, subsequently, by the District Court, that it had done "nothing" during the seventeen-month period commencing September 23, 1998, is legally and factually erroneous. Moreover, the Venture challenges the DNRC Director's determination that the Venture's interpretation of the Mineral Leases would lead to the absurd result of requiring that the permitting window remain open indefinitely.

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[22] "Permits" as defined in the Lease Amendment refers to "all federal, state and local licenses, permits, consents, authorizations, orders or clearances required for Development or Production."

¶60 The State urges this Court to follow the DNRC Director's interpretation of the Mineral Leases, and to likewise conclude that the Venture did nothing to pursue the permitting process during the seventeen-month period. The State claims the Venture took no action until it requested an administrative hearing on March 9, 2000, two weeks after the Mineral Leases expired on February 23, 2000. The State further notes that the DNRC hearing examiner found that the Venture's claim that it had no obligation to pursue the permitting process, in light of I-137, "flies in the face of the public policy of the state of Montana which is to get these mineral leases in operation," and would lead to the absurd result allowing the leases to run indefinitely, alleviating the Venture from taking any action whatsoever.

¶61 The Venture admits that it had to do "something" to pursue issuance of the permits. It is uncontested that the Venture paid its delinquent balance regarding the EIS fees, and it is likewise uncontested that the Venture filed a lawsuit in April 2000, challenging the validity of I-137, which the Venture claims constituted a pursuit of the permitting process. The issue therefore becomes a question of law: whether the Venture's challenges to I-137 constitutes the active pursuit of the permitting process.

¶62 We are hard pressed to conclude that judicially challenging a voter initiative, particularly without agreement with the agency, constitutes administrative action in pursuit of the permitting process. According to several affidavits filed on behalf of the State, prior to the expiration of the Mineral Lease terms on February 23, 2000, the Venture: (1) failed to obtain a final permit; (2) did not amend its application to propose an alternate legal method of gold recovery; (3) did not reach a MOA to further fund continued preparation of the EIS; (4) did not legally seek to compel the DEQ to complete the preparation of the EIS; (5) did not seek

any decision to grant or deny its application; (6) did not seek any administrative case hearings before the Division concerning its permit application; or (7) take any other action that would facilitate the permitting process while it sought to invalidate I-137. While pursuing all of these options may not have been necessary in order to "actively pursue" the permitting process, it is clear that the Venture was not limited to simply bringing a legal challenge to I-137 while doing nothing before the agency. We cannot conclude, therefore, that the DNRC and District Court's conclusion of law that the Venture failed to actively pursue the permitting process before the agency was erroneous. Challenging the validity of a voter-passed initiative under these circumstances, without more, does not constitute an administrative act of pursuing a permit. Therefore, the DNRC was not obligated to extend the primary terms of the Mineral Leases to include the time necessary for the Venture to seek the invalidation of I-137. Consequently, we conclude the Mineral Leases were properly terminated on February 23, 2000.

¶63 Alternatively, the Venture contends that the contractual doctrine of supervening impracticability suspended its obligations as specified in the February 24, 2000, letter from the DNRC. However, because we conclude the Venture failed to pursue the administrative process and, therefore, the Mineral Leases were properly terminated on February 23, 2000, we need not address this issue.

¶64 Finally, the Venture argues that the District Court failed to properly consider whether the lease terms should have been extended pursuant to Rule 36.25.605, ARM, which provides that:

> The board shall extend the term of the lease if it determines that a failure to produce in paying quantities is a result of factors beyond the control of the lessee such as but not

> limited to a national emergency or a temporary decrease in the price at which the particular metalliferous mineral or gem can be sold.

The Venture explains that, pursuant to the Restatement (Second) of Contracts and regulatory statement, performance obligations made impracticable by I-137 should be suspended during the time required for a final ruling on the law's validity, which is a finite period of time.

¶65 However, it was only after the Mineral Lease terms had expired, thereby terminating the leases entirely, that the Venture sought an extension of the lease term by invoicing Rule 36.25.605, ARM. The DNRC Director concluded that the Venture's request was untimely, and we agree. Therefore, we conclude that the District Court correctly upheld the DNRC's termination of the Mineral Leases.

¶66 The judgment entered by the District Court is affirmed.

/s/ Jim Rice
Justice

We Concur:

/s/ Karla M. Gray
Chief Justice

/s/ Patricia Cotter

/s/ W. William Leaphart

/s/ John Warner
Justices

Justice James C. Nelson concurs.

¶67 I concur in our Opinion except for certain parts of the discussion in ¶¶ 44, 45 and 48.

¶68 Basically, I agree with the State's argument and interpretation of paragraph 7 of the agreement, and I disagree with our conclusion that the passage of I-137 resulted in a substantial impairment of the Venture's contractual relationship with the State.

¶69 As noted, paragraph 7 provides that the Venture shall fully comply with "all applicable state and federal laws, rules and regulations, including but not limited to those concerning safety, environmental protection and reclamation." For the Venture to say that it never agreed to be bound by laws which would completely ban the use of the cyanide heap leaching process flies in the face of paragraph 7. Indeed, the Venture did, in fact, agree to be bound—*without limitation*—by all applicable laws, rules and regulations including those protecting the environment. If the Venture signed the agreement with qualifications, exceptions or caveats in mind, it had the obligation to disclose those to the State and to negotiate the contract terms accordingly.

¶70 Furthermore, I disagree with our conclusion that the Venture could not reasonably have anticipated I-137. The mining industry is one of the most heavily regulated industries in the State and has been for years. This regulation has, for the most part, become stricter over the years, due in no small measure, to environmental disasters resulting from poor mining practices, failed technology, failed economics, and taxpayers becoming increasingly fed up with having to pick up the pieces in the form of millions upon millions of dollars in cleanup costs. The Court's apparent adoption of the statement that "cyanide heap leaching has been shown to

be safer than other methods" to the contrary, the people of this State have twice exercised their collective judgment and have soundly rejected that notion. In this frame of reference, I am hard put to join the Court's conclusion that the passage of I-137 should have or did, in fact, come as any great surprise.

¶71 Finally, the federal Contracts Clause, Article I, Section 10—after which our own Article II, Section 31 is modeled—was historically adopted and construed with a focus on legislation designed to repudiate or adjust pre-existing debtor-creditor relationships that obligors were unable to satisfy. *Keystone Bituminous Coal Ass'n v. DeBenedictis* (1987), 480 U.S. 470, 503, 107 S.Ct. 1232, 1251, 94 L.Ed.2d 472 (citations omitted). As we note, notwithstanding its facially absolute language, the federal Contracts Clause has long been interpreted so as to accommodate the inherent police power of the State "to safeguard the vital interests of its people." *Home Bldg. & Loan Ass'n v. Blaisdell* (1934), 290 U.S. 398, 434, 54 S.Ct. 231, 239, 78 L.Ed. 413. The clause is not read literally. *W.B. Worthen Co. v. Thomas* (1934), 292 U.S. 426, 433, 54 S.Ct. 816, 818, 78 L.Ed. 1344. Moreover, "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson County Water Co. v. McCarter* (1908), 209 U.S. 349, 357, 28 S.Ct. 529, 531, 52 L.Ed. 828.

¶72 Here, the State leased a mineral estate to the Venture and, with that, the opportunity to go through the expensive, lengthy, highly regulated process to apply for and, maybe, obtain a permit to mine. There was no guarantee that this process would be successful anymore than there was any guarantee that the mining venture itself would succeed. The State did not repudiate its agreement with the Venture. Rather, and leaving aside its other problems, it was the

Venture that, in an increasingly strict regulatory environment, determined to mine using a process that was unacceptable to the people of Montana.

¶73 The Contracts Clause must accommodate the inherent police power of the State. Here, that power was exercised by the people pursuant to Article II, Sections 1 and 2 and Article III, Section 4, to prohibit a mining process which they collectively determined posed unacceptable risks to the environment and to their rights under Article II, Section 3 and Article IX, Section 1.

¶74 While I agree with most of our Contracts Clause analysis and with the result thereof, I do not concur with the statements in ¶¶ 44, 45 and 48, aforementioned, nor do I agree that the Venture suffered a substantial impairment of contract as a result of the passage of I-137.

¶75 With those qualifications, I concur.

/s/ James C. Nelson
Justice

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY
Cause No. BDV-2000-250

ORDER

SEVEN-UP PETE JOINT VENTURE, an Arizona general partnership, d/b/a SEVEN-UP PETE JOINT VENTURE, CANYON RESOURCES CORPORATION, a Delaware corporation, JEAN MURI, DR. IRENE HUNTER, DAVID MUIR, ALICE CANFIELD, TONY PALAORO, JUNE E. ROTHE-BARNESON, AMAZON MINING COMPANY, a Montana Partnership, PAUL ANTONIOLI, STEPHEN ANTONIOLI, and JAMES E. HOSKINS,

Plaintiffs,

v.

THE STATE OF MONTANA,

Defendant.

FACTUAL BACKGROUND

This case arises out of the November 1998 passage of Initiative 137 (I-137) by the voters of Montana. I-137 has been codified at Section 82-4-390, MCA, which provides:

> **Cyanide heap and vat leach open-pit gold and silver mining prohibited.** (1) Open-pit mining for gold or silver using heap leaching or vat leaching with cyanide ore-processing reagents is prohibited except as described in subsection (2).
>
> (2) A mine described in this section operating on November 3, 1998, may continue

> operating under its existing operating permit or any amended permit that is necessary for the continued operation of the mine.

The principal Plaintiff in this action is the Seven-Up Pete Venture (hereinafter the Venture). The Venture is the successor to six mineral leases located on school trust lands near Lincoln, Montana. The mineral leases were initially issued to Western Energy Company over a period extending from 1986 through 1989. In 1991, the Venture became the successor to Western Energy. The Venture also owns surface and mineral interests not associated with the aforementioned mineral leases.

The individually named Plaintiffs have interests in surface and mineral interests in the general vicinity of Lincoln, Montana, but do not have an interest in the six mineral leases.

Each of the mineral leases contains a primary term of ten years and a secondary term that commences with and continues through the production of minerals. Continuation of the leases beyond the primary term requires the production of paying quantities of minerals. The leases also prohibit any mining until the state of Montana has approved an operating plan submitted by the lessee.

In 1992, the Venture obtained a exploration license from the state of Montana via the Montana Metal Mine Reclamation Act. Section 82-4-301, MCA.

Of great concern to the parties in these proceedings is paragraph number 7 in the leases which provides: "The lessee shall fully comply with all applicable state and federal laws, rules and regulations, including but not limited to those concerning safety, environmental protection and reclamation."

Shortly, the Court will set forth many subsequent agreements and letters exchanged between the Venture and the state of Montana. None of these subsequent letters, agreements and documents in any way modified paragraph 7 of the leases.

None of the leases mentioned above specifically authorized or mentioned a particular method of mining. The second paragraph of the leases provides: "The lessor, in consideration of the annual rentals provided for herein, the royalties to be paid, and the covenants to be kept and performed by the lessee, leases to the lessee for the purpose of mining metalliferous minerals and or gems as described below, all the lands described as follows . . . ."

The Venture has gone to great lengths to argue that the contract between the parties includes more than the leases mentioned above. The Court, and the State in its response, agree that the later documents can be included as part of the "contract" between the parties. However, remaining at some dispute is the exact nature of the agreement between the parties.

On November 21, 1994, the Venture submitted an application for an operating permit. Pursuant to Section 82-4-337, MCA, the state of Montana has 60 days to render a decision on the application. The 60-day deadline was extended by the parties by a number of agreements. The last one signed by the parties was on July 22, 1998, and extended the decisional deadline to January 31, 2000.

The project proposed by the Venture was of a grand scale. Therefore, it required an environmental impact statement (EIS) pursuant to Section 75-1-201, MCA. The preparation of the EIS has been a gargantuan task.

The parties entered into a Memorandum of Agreement (MOA) on November 1, 1993. The MOA

generally provided guidance as to the further preparation of the EIS for the Venture's proposed mining operations.

The Court would note that the EIS has never been completed. According to the state of Montana, the Venture failed to keep current on invoices submitted to it for completion of the EIS.

In August 1994, the parties entered into a Mineral Lease Amendment Agreement. This agreement extended the primary terms of the mineral leases by a period equal to the time required for the permitting process. Section 6 of the Mineral Lease Amendment Agreement provided, in part: "Except as expressly amended hereby, the Mineral Leases shall remain in full force and effect according to their terms."

The Mineral Lease Amendment Agreement contained what the parties have denominated a "delay rental provision" that provided a $150,000 per month payment to the state of Montana. Also, the parties seem to agree that once the mine became operational, the state of Montana could reasonably expect a $5 million annual royalty from the Venture.

The Venture has gone to great lengths in its papers responding to the State's motion for summary judgment to argue that the state of Montana knew that the Venture's proposal was for an open-pit cyanide heap-leach operation. The State does not dispute this fact, and this Court also acknowledges that it is clear that the state of Montana knew the nature of the Venture's proposal. For example, the Court has seen the December 13, 1993, request for proposals (RFP) for the EIS. This RFP acknowledges that the proposed project would use open-pit mining and heap-leaching.

Also, the Court has seen a letter to the Venture from Monte Mason, chief of the Minerals Management Bureau of the Department of State Lands. This letter was sent after the aforementioned Mineral Lease Amendment Agreement was

entered into by the parties. Paragraph number 1 of the letter provided "Lessee may propose extraction of gold and silver from ore by means of a cyanide heap-leach closed solution system." It should also be noted that the last sentence of the first un-numbered paragraph of the aforementioned letter provided: "This letter is not an endorsement or approval of any facet of Lessee's contemplated mining plan." Thus, it is clear that the state of Montana knew that the Venture was proposing an open-pit, cyanide heap-leach operation.

Work on the EIS was stopped by the state of Montana on July 2, 1998, since the Venture was not paying the State's invoices. In September 1998, the state of Montana sent the Venture a letter indicating that the permitting period for the operating permit was at an end and that the leases' primary term had again begun to run. The unpaid invoices were paid in full by the Venture on December 31, 1998. In February 2000, the state of Montana declared the leases to be terminated.

PROCEDURAL BACKGROUND

This case has previously been described by this Court as an "epic struggle." Therefore, this Court can scarcely begin to provide a detailed procedural background. The interested reader, if more detail is desired, is invited to examine the Court file and this Court's earlier order.

This matter began with the filing of a 27-page amended complaint and petition for judicial review on November 28, 2000. The Court earlier addressed the state of Montana's partial motion to dismiss by this Court's November 1, 2001, Order. In that order, this Court dismissed Counts One, Two, Three, and Five with prejudice.

Before moving on, the Court should note two items of the complaint that might prove to be of interest. First, paragraph 29 of the complaint acknowledges that since at

least 1970, the use of cyanide with respect to the processing of ores has been subject to various regulations in the state of Montana. Further, paragraph 83 alleges that there is no gold or silver recovery process other than open-pit mining combined with cyanide heap-leaching which would allow the economically viable production of ores from the mineral leases here involved.

Left before the Court are a variety of counts that are generally classified as the taking counts, the contract counts and the judicial review counts. Specifically, the remaining counts are as follows:

Count Four alleges that I-137 violates the United States and Montana Constitutions by impairing the obligations of the contracts.

Count Six alleges that if the Court should find that I-137 is a permissible enactment, it constitutes a permanent taking of property from the Venture.

Counts Seven and Eight allege that if I-137 is a valid enactment, it constitutes a taking against the individually named Plaintiffs and Amazon Mining Company in violation of the Montana Constitution.

Count Nine alleges that if I-137 is found to be an invalid legislative enactment, it constitutes a temporary taking from the Venture during the period of time that I-137 was the law in the state of Montana.

Count Ten alleges a similar temporary taking from Plaintiff Canyon Resources.

Count Eleven alleges a breach of contract whereby the Plaintiffs allege that, by the enactment of I-137, the State breached its obligation to the Venture by ensuring the Venture that it would get a decision approving, denying, or

approving its application with modifications, and that the State would not change the decisional statutes prior to such decision in a way such as to preclude approval of the application.

Count Twelve alleges a breach of the covenant of good faith and fair dealing in two ways. The first violation, according to Plaintiffs, occurs through the allegations of Count Eleven. The second violation alleges that during the proposal and pendency of I-137, the State signaled potential breach of its contractual assurance to the Venture. According to Plaintiffs, this created a situation wherein the Venture was required to mitigate its potential damages and was therefore justified in not making further EIS payments pending the outcome of the I-137 election. This resulted, according to Plaintiffs, in the September 1998 declaration by the State that the primary terms of the leases had recommenced.

Count Thirteen seeks judicial review, pursuant to Section 2-4-702, MCA, of the Department of Natural Resources and Conservation's decision canceling Plaintiffs leases mentioned above, as affirmed by Hearing Examiner Clinch on October 26, 2000.

Count Fourteen seeks declaratory judgment that the state of Montana, through the DNRC and Hearing Examiner Clinch's order of October 26, 2000, violated its contractual obligations to the Venture, that the Venture's leases are in good standing and seeking this Court's order requiring the State to specifically perform the mineral leases as amended by the various post-lease documents mentioned above.

MOTION FOR SUMMARY JUDGMENT

Standard of Review

Summary judgment is proper only when no genuine issue of material fact exists and the moving party is entitled

to judgment as a matter of law. Rule 56(c), M.R.Civ.P. The movant has the initial burden to show that there is a complete absence of any genuine issue of material fact. To satisfy this burden, the movant must make a clear showing as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact. Minnie v. City of Roundup, 257 Mont. 429, 431, 849 P.2d 212, 214 (1993). The burden then shifts to the party opposing the motion to show, by more than mere denial and speculation, that there are genuine issues for trial. Sunset Point v. Stuc-O-Flex Int'l, 287 Mont. 388, 392, 954 P.2d 1156, 1159 (1998). The party opposing the summary judgment is entitled to have any inferences drawn from the factual record resolved in his or her favor. Rule 56(c), M.R.Civ.P.

Summary judgment motions encourage judicial economy through the elimination of unnecessary trial, delay and expense. Bonawitz v. Bourke, 173 Mont. 179, 182, 567 P.2d 32, 33 (1977). However, summary judgment is not to be utilized to deny the parties an opportunity to try their cases before a jury. Brohman v. State, 230 Mont. 198, 202, 749 P.2d 67, 70 (1988). "Summary judgment is an extreme remedy and should never be substituted for a trial if a material fact controversy exists." Clark v. Eagle Sys., Inc., 279 Mont. 279, 283, 927 P.2d 995, 997 (1996) (citations omitted). If there is any doubt as to the propriety of a motion for summary judgment, it should be denied. Rogers v. Swingley, 206 Mont. 306, 670 P.2d 1386 (1983); Cheyenne Western Bank v. Young, 179 Mont. 492, 587 P.2d 401 (1978); Kober v Stewart, 148 Mont. 117, 122, 417 P.2d 476, 479 (1966).

Contract-Based Claims

The Venture has alleged that I-137 caused a breach of the State's contractual obligations: Count Four (unconstitutional impairment of contracts), Count Eleven (breach of contract), Count Twelve (breach of implied

covenant of good faith and fair dealing), and Count Fourteen (specific performance).

In Count Four, Plaintiffs allege that I-137 unconstitutionally impairs its contractual obligations in violation of the Montana and Federal Constitutions. The contract clauses of the Montana and United States Constitutions have generally been interpreted as "interchangeable guarantees against legislation impairing the obligation of contract." Carmichael v. Workers' Compensation Ct., 234 Mont. 410, 414, 763 P.2d 1122, 1125 (1988) (citations omitted). A contracts clause analysis requires a three-step inquiry: First, a court must determine whether the state law substantially impairs the contractual relationship. Second, a court must determine whether the state has a significant and legitimate purpose for the law. Lastly, a court must determine whether the law imposes reasonable conditions that are reasonably related to achieving the law's purpose. Id.

1. Substantial Impairment

The initial inquiry is whether I-137 substantially impaired the contract between the State and the Venture. This inquiry has three components: whether there is a contractual relationship; whether a change in law impairs that contractual relationship; and whether the impairment is substantial. General Motors Corp. v. Romein, 503 U.S. 181, 186. There is no dispute that a contractual relationship existed between the State and the Venture. However, the State argues that I-137 worked no impairment of that relationship.

In support of this contention, the State relies on Paragraph 7 of the mineral leases which provides that the Venture "shall fully comply with all applicable state and federal laws, rules and regulations, including but not limited to those concerning safety, environmental protection and

reclamation." The State maintains that the prohibition against open-pit mining for gold or silver using heap-leaching or vat-leaching with cyanide ore-processing reagents contained in I-137 is a state law aimed at environmental protection with which the Venture expressly agreed to comply. Therefore, I-137 could not have impaired their contractual relationship.

The Venture responds that the contractual relationship between it and the State is comprised of many agreements that, when considered together, provide no basis for the State's contention that the Venture agreed to be bound by a subsequent law prohibiting open-pit, cyanide leach mining. The Venture contends that its contractual relationship consists of not merely the mineral leases, but also includes the 1993 Memorandum of Agreement, the 1994 Mineral Lease Amendment Agreement, the "letter agreement," and the "letter of clarification." The Venture argues that when the contractual relationship is seen as a whole, it is clear that the parties contemplated that the Venture would mine gold and silver ore by way of an open pit and use cyanide leaching to process the ore.

As noted earlier, there is no dispute but that both parties knew that the Venture was seeking a permit for an open-pit mine utilizing cyanide heap-leach processing of the ore. As noted above, our first task is to decide whether I-137 substantially impaired the parties' contractual relationship. One item of consideration in this regard is whether the industry has been regulated in the past. See Energy Reserves Group v. Kansas Power & Light, 459 U.S. 400, 411 (1983). There is no doubt that the mining industry is a heavily regulated industry. See Associated Press, Inc. v. Mont. Dept. of Revenue, 2000 MT 160, ¶ 41, 300 Mont. 233, ¶ 41, 41 4 P.3d 5, ¶ 41. The Venture agreed in the mineral leases to be bound by future environmental regulations. The Venture could have negotiated for protection from the possibility that

its project might become illegal, possibly by using some damage agreement, but did not. See Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach, 86 Cal. App. 4th 534, 557 (Cal. Ct. App. 2001).

As the State notes, the facts of Stop Oil are remarkably similar to the instant case and shed some light on this issue. In 1932, the voters of Hermosa Beach enacted a ban on all oil and gas operations. In 1984, the voters adopted two ballot measures creating exceptions to the ban on oil exploration and production for two publicly-owned sites within the city. In 1985, the city enacted the Hermosa Beach Oil Code which, among other things, established a permit system for drilling and oil recovery. The city eventually entered into a lease agreement with Macpherson Oil Company which granted the lessee the right to conduct oil and gas operations within the city.

Similar to the instant case, the lease required Macpherson to obtain all necessary permits and to comply with all laws, rules and regulations. Id. at 556. Macpherson prepared an environmental impact statement. The city issued a conditional use permit in 1993. The State Lands Commission also approved the lease. All that remained was a coastal development permit from the California Coastal Commission. In February 1998, the commission authorized its staff to issue a permit once certain conditions had been satisfied.

Beginning in 1994, the Hermosa Beach Stop Oil Coalition began a campaign to qualify a ballot initiative to end the Macpherson project and to reinstate the comprehensive ban on oil drilling in the city. The measure, Proposition E, appeared on the November 1995 ballot. Proposition E's statement of intent stated that "[c]lean water, pure air, and a safe environment are vital to maintaining the quality of life" and that these goals require that drilling and

production of oil be prohibited. Proposition E was approved with 56 percent of the vote.

Notwithstanding the adoption of Proposition E, the city continued to perform under its lease with Macpherson because it was concerned about the legality of terminating the lease. The Stop Oil Coalition commenced a lawsuit for declaratory and injunctive relief to require the city to apply Proposition E to the Macpherson project. The trial court held that the prohibition applied to the Macpherson project, but that termination of the lease would constitute an unconstitutional impairment of contract. On appeal, the court noted that the oil exploration industry is heavily regulated and that by agreeing to abide by all applicable laws and to obtain the proper permits, Macpherson explicitly recognized the city's authority to regulate the project in the future. Id. at 557. The court concluded that Macpherson could have bargained for a provision imposing on the city the risk of a performance-defeating change in the law. Id. Against this backdrop, the court concluded that "these factors could well justify a conclusion that Proposition E did not effect any substantial impairment." Id.

This Court concludes that like in Stop Oil there was no unconstitutional impairment of contract in this case. Of crucial import to this Court is the fact that paragraph 7 of the mining leases put the Venture on clear notice that it could be subject to future environmental laws. The Venture is certainly a most sophisticated party and could have negotiated some sort of protection for itself.

Also of great concern to this Court is exactly what constitutes the contract between these parties. None of the written documents between these parties obligates the state of Montana to allow open-pit mining along with cyanide heap-leaching on the land subject to the mineral leases. While this may have been what the Venture intended, the state of Montana nowhere agreed to allow such a proposal. Central

to the Venture's claim here is its allegation in paragraph 138 of the amended complaint where it states:

> By the enactment of I-137, the State breached its contractual assurance that the Venture would get a decision approving, denying[,] or approving its permit application with modifications, and that the State would not change the decisional statutes prior to such decision, in a way so as to preclude approval of the application.

While this is certainly the expectation of the Venture, the State made no such agreement. These parties have entered into any number of written agreements, memorandums and letters of understanding. The contractual language hoped to be inserted by the Venture, just quoted, appears in none of those documents. Thus, the impairment was not of the parties' contract, but was of the Venture's desires.

The Court here is mindful that certain other parties have exempted themselves from future regulation of contractual activities. See, e.g., Mobile Oil Exploration & Producing Southeast v. United States, 530 U.S. 604 (2000). In that case, the plaintiff negotiated for a clause exempting themselves from future regulations by subjecting themselves only to those regulations in effect at the time the lease was signed. Another interesting case in this regard is Energy Reserves Group, 459 U.S. 400. That case provides two principals that support this Court's contention. First, the court held that: "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." Id. at 411. In other words, the Venture cannot remove itself from future environmental regulations merely by signing the subject mineral leases with the state of Montana. The contracts in Energy Reserves Group expressly recognized the existence of extensive regulation and provided that any

contractual terms were subject to relevant present and future state and federal law. The supreme court noted that this language could be interpreted to incorporate all future state regulation and thus dispose of the contract clause claim. Id. at 416.

This Court also notes the holding by the Montana Supreme Court in Wallace v. Dept. of Fish, Wildlife & Parks, 269 Mont. 364, 889 P.2d 817 (1995). In that case, the plaintiffs applied for a license to expand their elk ranching operation. However, between the time of the application and the time for the decision, the applicable law had changed. The Montana Supreme Court held that in deciding the license application, the State would use the law in effect at the time of the decision despite the fact that it may have changed since the date of the application. Id. at 368, 889 P.2d at 820. The Court recognizes that this is not a contract case, but it is instructive.

Having disposed of the contract claim by finding that there was no substantial impairment of the contractual relationship, the Court need not address the other two prongs of the three-part test announced in Carmichael. However, the Court will briefly address them out of an abundance of caution.

First, the Court must determine if there is a significant and legitimate purpose for the law (here I-137), and then the Court must determine if it imposes reasonable conditions which are reasonably related to achieving the legitimate purpose. It is clear that the State has a legitimate interest in protecting the environment. Indeed, its legitimate interest in guarding against imperfectly understood environmental risks, even though those risks may ultimately prove to be negligible. Maine v. Taylor, 477 U.S. 131, 148 (1986). The Montana Supreme Court has held that regulations protecting the State's environment are reasonable exercises of the police

power. Western Energy Co. v. Genie Land Co., 195 Mont. 202, 211, 635 P.2d 1297, 1302 (1981).

Here, the Court notes the 1998 voter information pamphlet that was published in support of I-137. That pamphlet provided that the intent of I-137 was to guard against potential State environmental liabilities, which might be reduced if cyanide leaching for mineral processing was prohibited. Protection of the environment is a significant and legitimate purpose.

Next, the Court must see if the condition of I-137 is reasonable and whether it is reasonably related to achieving that legitimate purpose. Again, the Court finds in the affirmative. In this regard, the Court notes that it must grant deference to the State's judgment on what is reasonable and necessary in matters such as this. United States Trust Co. v. New Jersey, 431 U.S. 1, 22-23 (1977). Of crucial importance here is a determination of what power the State is exercising. The usual deference given to the State's judgment on what is reasonable and necessary is not appropriate if, in general, the State is a party to the contract. If the regulation affects the State's financial obligation, it is generally a taxing and spending power being exercised, and not the police power. In such cases, the self-interest of the State is at issue and the State should not be granted the usual deference. Here, although the State is a party, the Court has already noted the annual royalties that the State lost pursuant to the passage of I-137 and the monthly delayed royalties that were lost. Indeed, the Venture, at page 31 of its brief opposing summary judgment, indicates that the State's total royalty lost by the passage of I-137 is between 70 and 80 million dollars. Thus, the State's financial interest is not at issue in this case. It is the police power of the State at issue here, and not its taxing and spending power. Such being the case, the regulation is entitled to the usual deference to the State's

judgment on reasonableness and necessity. See Stop Oil, 86 Cal. App. 4th at 561.

Therefore, this Court rules that I-137 did not impair the obligation of any contract between the State and the Venture. Primarily this is so because the parties never had a specific written contract that forbade the State from changing its environmental regulations. On the contrary, the written contract between the parties acknowledged that there might be a change and, if there was, that the Venture would be subject to any such change.

With the collapse of Count Four (alleged impairment of the obligation of contracts), Plaintiffs' remaining contracts claims also fail. For example, Count Eleven alleges a breach of contract. However, the basis for the breach and agreement that the decisional statutes would not change before a permanent decision was made was never a part of the contract between these parties. Further, the alleged breach of the covenant of good faith and fair dealing alleged in Count Twelve also falls, since in order for it to exist at all, there must be an initial breach of a contract. Montana Bank, N.A. v. Ralph Meyers & Son, 236 Mont. 236, 245, 769 P.2d 1208, 1214 (1989). Further, Count Fourteen which seeks specific performance also must fail since this Court has found that there was no breach of contract between the parties. Thus, the State is entitled to summary judgment on Counts Four, Eleven, Twelve and Fourteen.

2. Takings Claims (Counts Six, Seven, Eight, Nine, and Ten)

In the second category, the Venture has alleged that by passing I-137, the State took their property.

Article II, Section 29 of the Montana Constitution provides that private property shall not be taken for public use without just compensation. The scope of Montana's

constitutional takings protections has been determined with reference to decisions interpreting federal takings protections. See Kudloff v. City of Billings, 260 Mont. 371, 860 P.2d 140 (1993). This provision protects private property owners from absolute conversion, by way of condemnation, as well as uncompensated takings of property by way of regulation. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). With regard to regulatory takings, courts have had little success in devising any set formula for determining when governmental regulation of private property amounts to a taking. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992). The United States Supreme Court has identified two specific circumstances in which a government regulation is categorically a taking: (1) regulations that compel a property owner to suffer a permanent physical "invasion" or "occupation" of his or her property, see e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); and (2) regulations that deny "all economically beneficial or productive use of land." Lucas at 1015. In the absence of a categorical taking, the United States Supreme Court has repeatedly recognized that "whether a particular restriction [amounts to a taking] depends largely upon the particular circumstances [of each] case." Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (quotation omitted). In this regard, the supreme court and lower courts have indicated that most regulatory takings cases should be resolved by balancing the public and private interests at stake, with three primary factors weighing in the balance: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. Penn Central, 438 U.S. at 124.

Of crucial importance here is a determination of what, if anything, was taken from the Venture. The Venture

alleges that when I-137 was passed, it had a right to pursue the approvals necessary to commence its open-pit cyanide heap-leaching mining process. However, this is not necessarily true since, as has been noted earlier in this decision, none of the contractual documents in this case granted the Venture that right. It is true that the Venture was processing an application, but until that application was approved, the Venture had only the right to pursue its application, subject to existing and future environmental regulations. This is not a case where the State stopped an on-going mine operation. Indeed, such operations are specifically excluded from the purview of I-137. Further, this is not a case where the State took away a permit, since none had been issued.

The leases did not create a property right that was taken away by I-137. Pursuant to those leases, the Venture could begin mining operations only if they received an operating permit which, pursuant to the leases themselves, was subject to all applicable environmental regulations.

In any takings analysis, one must carefully analyze what is actually being taken away. Although the law of takings has proved extraordinarily vexing for the courts, at least one settled principal remains and that is:

> [E]ven if government action might otherwise constitute a taking of property, it will not if it is shown that what the government prohibits does not amount to a private property right in the first place. Said another way, an owner cannot maintain an action for loss of property that it did not ever have.

Kinross Copper Co v. Oregon, 981 P.2d 833, 836-37 (1999); Stevens v. City of Cannon Beach, 854 P.2d 449 (1993) *cert. denied* 510 U.S. 1207 (1994); Lucas, 505 U.S. 1003.

As noted by the Kinross court, "the determinative inquiry is whether what the government has prohibited is itself a property right." Kinross, 981 P.2d at 837.

Here, what I-137 prohibited was open-pit cyanide heap-leach mining. The Venture did not have a property right to conduct that type of mining on the leases here in question. It had not even obtained a operating permit to mine, and its activities were subject to all environmental regulations.

As noted above, the Venture never possessed a contract with the state of Montana that said they could mine in the manner which they desired. The leases gave the Venture the exclusive right to submit an application for an operating permit on the land subject to the leases. The leases did not pre-approve any particular type of mining operation. In addition, it should be noted that I-137 does not affect the Venture's other potential uses of the mineral leases or a way to exploit them.

Thus, this Court concludes that there was no unconstitutional taking of any property right that Plaintiffs owned in the mining leases. Such being the case, the state of Montana is entitled to summary judgment on Counts Six, Seven, Eight, Nine, and Ten.

PETITION FOR JUDICIAL REVIEW

Also before this Court is the Venture's appeal of the hearing examiner's October 26, 2000 order. Many of the facts giving rise to the petition for judicial review have been mentioned elsewhere in this decision. However, the Court will mention some of them again as the need may arise.

On September 23, 1998, the DNRC notified the Venture that:

> "any period of time beyond September 23, 1998 does not constitute time required for the permitting decision under . . . the August 26, 1994 Amendment Agreement unless all past-due EIS invoices are paid and an acceptable Memorandum of Agreement is executed to fund the preparation of the EIS. After September 23, 1998, the remaining unexpired primary term of seventeen months would begin to run for each of the above-described mineral leases.

(State's Ex. 1.)[1]

The next item in the contested case record is State's Exhibit 2 which is the DNRC's February 24, 2000 letter advising the Venture that the leases had terminated. That letter noted that since the earlier letter of September 23, 1998, the past-due EIS invoices had been paid, but a revised memorandum of agreement had not been executed. Basically, the reason for the termination was a failure to pursue the permitting process. According to the affidavit of Warren McCullough, there had been no permitting efforts undertaken by the Venture after September 23, 1998. (See State's Ex. 23.) Further, the McCullough affidavit tells us that there was no mineral production from the leases.

After receiving the February 4, 2000 letter, the Venture, by letter dated March 9, 2000, requested a hearing. (State's Ex. 3.) No hearing was ever held. The hearing examiner issued an order on October 26, 2000 granting the State's motion for summary judgment. The hearing examiner noted that the parties had agreed to extend the

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[1] Reference to exhibits in this portion of the Order refer to the administrative record on judicial review.

running of the leases pending the permitting process, but he also noted that it would be against the public policy of the State to allow this to go on forever. The hearing examiner did note that the Venture did file suit seeking a declaration of the invalidity of I-137, but that did not occur until after the leases had terminated. The Venture also looked at alternate methods of mining the property, but did nothing else to pursue permitting the mining of the area pursuant to the leases.

As noted by the hearing examiner:

> If the Lessee had taken any action, administrative or otherwise, to further the permitting process, this outcome may have differed. The Lessee has not, however, presented any evidence that the Lessee took any steps within the administrative or judicial systems, sough no other remedy, nor undertook any substantive action to stem the procession of the permitting clock. . . . The requisite action must comprise something more than mere thoughts or discussions of what an action might be. . . . . The Lessee had 17 months in which to contest the Department's September 23, 1998 decision, to seek judicial review or relief or in some manner to engage in the permitting process. The Lessee availed itself of none of these.

(State's Ex. 25.)

Standard of Review

A district court's review of an administrative agency's order is governed by the Montana Administrative Procedure Act. The standard of review for an agency

decision is set forth in Section 2-4-704(2), MCA, which provides:

> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:
>
> (a) the administrative findings, inferences, conclusions, or decisions are:
>
> (i) in violation of constitutional or statutory provisions;
>
> (ii) in excess of the statutory authority of the agency;
>
> (iii) made upon unlawful procedure;
>
> (iv) affected by other error of law;
>
> (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
>
> (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (b) findings of fact, upon issues essential to the decision, were not made although requested.

The Montana Supreme Court has adopted a three-part test to determine if a finding is clearly erroneous. Weitz v. Montana Dep't of Natural Resources and Conservation, 284 Mont. 130, 943 P.2d 990 (1997). First, the Court is to review the record to see if the findings are supported by substantial evidence. Second, if the findings are supported by substantial evidence, the Court is to determine whether the agency misapprehended the effect of the evidence. Third,

even if substantial evidence exists and the effect of the evidence has not been misapprehended, the Court still can determine that a finding is clearly erroneous "when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that mistake has been committed." Weitz, 284 Mont. at 133-34, 943 P.2d at 992. Conclusions of law, on the other hand, are reviewed to determine if the agency's interpretation of the law is correct. Steer, Inc. v. Dept. of Revenue, 245 Mont. 470, 474, 803 P.2d. 601,603 (1990).

Discussion

In reviewing the facts presented, the Court must deny the petition for judicial review. In the first instance, the Court is to give deference to interpretations of regulations and statutes by the agencies entrusted to enforce them. Certainly, Hearing Examiner Clinch has a valid point when he suggests that after notification of the resumption of the primary term in September 1998, the Venture could not just sit around for 17 months and do nothing, and then expect that the leases would continue to run indefinitely. Certainly, any such argument flies in the face of the public policy of the state of Montana which is to get these mineral leases in operation.

The Venture suggests that ARM 36.25.605 provides it with some relief. That provision states, in part:

> The board shall extend the term of the lease if it determines that a failure to produce in paying quantities is a result of factors beyond the control of the lessee such as but not limited to a national emergency or a temporary decrease in the price at which the particular metalliferous mineral or gem can be sold.

The provisions of I-137 which prohibit the very application upon which the Venture wants to proceed cannot be considered a factor beyond the control of the lessee.

Next, the Court agrees with the hearing examiner's conclusion that the administrative code provision just mentioned cannot be applied to a mineral lease prior to the initiation of production. The DNRC is the agency tasked with the decision to interpret administrative rules such as ARM 36.25.605, and its interpretation that it applies to producing mineral leases is entitled to considerable weight by this Court.

The hearing examiner was also concerned that the Venture did not raise the provisions of the rule prior to the expiration of the leases. Indeed, the Venture did nothing until the leases expired.

The Venture also suggests that pursuant to ARM 36.25.617, should a hearing be requested, the termination of the above-described leases should be stayed pending the outcome of the hearing. This Court finds that this provision has nothing to do with this case. A hearing was not requested until after the leases had been terminated. While the Court is under the impression that the parties have operated on the assumption that the leases have not terminated until this Court issues its ruling, the just mentioned administrative rule would apply if, let us say, a lease was to expire on Tuesday, and a hearing was requested on the matter on Monday. Here, we have a situation where the leases terminated on Monday, and a hearing was requested on Tuesday. Thus, the aforementioned administrative rule has nothing to do with the hearing examiner's decision.

The Venture also suggests that many matters of a factual nature were improperly decided by the hearing examiner without holding a hearing. However, it is the

impression of this Court that all parties were given ample opportunity to present any disputed issues of fact prior to the date of the hearing examiner's decision on summary judgment. The issues of fact that would have prevented the hearing examiner from making his decision would have to be material to his decision. The Venture has not shown this Court that any such material questions of fact existed. Thus, the question of whether the Venture intended to abandon its mineral leases is not material. The simple fact is that the Venture had a 17-month period within which to recommence its permitting process or do something else to stop the running of the primary term of the leases, but the Venture did nothing. This is a matter of interpreting the contract, not of divining the intent of the parties. In other words, the issue of abandonment is not material, because if it were, it would be to suggest that a mineral lease's primary term could continue indefinitely pending the permitting processes and the subjective intention of the lessee.

CONCLUSION

Therefore, based on the above, it is hereby ORDERED, ADJUDGED AND DECREED that:

1. The state of Montana is GRANTED summary judgment on all remaining counts in this matter.

2. The Court hereby DENIES the Venture's request for judicial review and affirms the order of the hearing examiner dated October 26, 2000.

DATED this 9 day of December, 2002.

/s/ Jeffery M. Sherlock
District Court Judge

pc. Alan L. Joscelyn
Randy L. Parcel
Mike McGrath
Tommy H. Butler
John North
Karl J. Englund/Elizabeth A. Brennan/
Jack R. Tuholske

FILED Nov 1, 2001

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

Cause No. BDV 2000-250

ORDER ON STATE'S PARTIAL MOTION TO DISMISS, OR ALTERNATIVELY, FOR SUMMARY JUDGMENT

SEVEN UP PETE VENTURE, an Arizona General Partnership, d/b/a, SEVEN UP PETE JOINT VENTURE, CANYON RESOURCES CORPORATION, a Delaware corporation, JEAN MUIR, DR. IRENE HUNTER, DAVID MUIR, ALICE CANFIELD, TONY PALAORO, JUNE E. ROTHE-BARNESON, AMAZON MINING COMPANY, a Montana partnership, PAUL ANTONIOLI, STEPHEN ANTONIOLI, and JAMES E. HOSKINS,

Plaintiffs,

v.

THE STATE OF MONTANA,

Defendant.

Currently before this Court is the State of Montana's partial motion to dismiss or, alternatively, for summary judgment filed August 18, 2000.

BACKGROUND

Plaintiffs are the holders of mineral leases, surface leases, fee surface, and fee mineral interests located east of Lincoln, Montana, in Lewis and Clark County. Plaintiffs are currently in the process of developing gold and silver mining operations associated with their property interests near Lincoln. The instant dispute is, for the most part, centered on six metalliferous mineral or gem mining leases in the McDonald Mine Project area (McDonald Project) issued by the State of Montana which authorize Plaintiffs' to mine gold, silver and other associated minerals. The underlying mineral estates which are the subject of these leases are held by the State as part of its School Trust holdings.

Plaintiffs commenced discussions with the Montana Department of State Lands (DSL) in 1992 regarding the acquisition of a permit pursuant to the Montana Metal Mine Reclamation Act (MMRA) to begin mining and mineral processing on the McDonald Project. On November 1, 1993, Plaintiffs entered into a Memorandum of Agreement with the DSL to address administrative issues arising out of the Environmental Impact Statement (EIS) required by the Montana and National Environmental Policy Acts. Approximately a year later, due to growing uncertainty whether sufficient time remained on the leases to complete the permitting process, Plaintiffs and DSL entered into an agreement extending the primary term of the six McDonald Project leases.

In November 1994, Plaintiffs submitted an application for an operating permit to DSL for review under the MMRA. Plaintiffs proposed to construct and operate the McDonald Project as a surface mine combined with cyanide leaching for gold and silver. On March 22, 1996, the Department of Environmental Quality (DEQ) determined that Plaintiffs' application was complete for purposes of the

MMRA.[1] Plaintiffs subsequently agreed to extend the deadlines for entry of a record of decision on its application for an operating permit, as set forth in § 82-4-337, MCA, until January 2000. As the environmental review process unfolded, Plaintiffs executed a series of change of scope and contract modifications regarding the production of the EIS. On July 2, 1998, DEQ issued a stop work order on the McDonald Project EIS due to Plaintiffs' non payment of fees related to third-party EIS services. The Montana Department of Natural Resources and Conservation (DNRC) informed Plaintiffs in September 1998 that, as a result of the DEQ's stop work order, the primary terms of the McDonald Project leases had commenced to run. DNRC has since notified Plaintiffs that the McDonald Project leases have terminated. Plaintiffs' administrative appeal of DNRC's lease termination was denied by summary judgment.

In the November 1998 general election, Montana voters passed Initiative 137 (I-137), which specifically prohibited "open-pit mining for gold or silver using heap leaching or vat leaching with cyanide ore-processing reagents." Subsequently codified at Section 82-4-390, MCA (1999), I-137 exempted mines in operation prior to November 3, 1998. Section 82-4-390(2), MCA. Plaintiffs had not acquired the necessary operating permits prior to the enactment of I-137. In late 1998, the State informed Plaintiffs that it was unable to process an application contemplating the cyanide processing of gold and silver ore. Plaintiffs claim that they are not able to submit a new or amended permit application complying with I-137 because there are no alternatives besides cyanide leaching which will allow economically viable production of gold and silver from the McDonald Project. The suspension of the permitting

[1] In the meantime, as part of an executive agency reorganization, the Montana Department of Environmental Quality assumed DSL's responsibilities under the MMRA.

process caused the primary terms of Plaintiffs' leases to expire. Plaintiffs expended substantial sums of money during the processing of its operating permit application.

On April 11, 2000, Plaintiffs filed a complaint in the United States District Court for the District of Montana alleging that I-137 violated their constitutional rights and seeking declaratory and injunctive relief concerning the unconstitutionality and unenforceability of I-137, as well as compensation for the takings I-137 allegedly wrought. The Federal District Court has subsequently dismissed with prejudice Plaintiffs' substantive due process claim as "simply a takings claim by another name," dismissed without prejudice Plaintiffs' takings claims as unripe due to pending proceedings in this Court, and stayed proceedings on their federal-law based claims.

On the same day that Plaintiffs filed their federal complaint, they also filed a complaint in this Court. Plaintiffs' initial complaint alleges 12 separate counts: Count One claims that the text of I-137 failed to meet statutory requirements governing the presentation of initiatives. Count Two claims that I-137 violates Plaintiffs' substantive due process rights. Count Three claims that I-137 violates Plaintiffs' equal protection rights. Count Four claims that I-137 unconstitutionally impairs their contract with the State. Count Five claims that I-137 is invalid because it exceeds the inherent limits of the State's police powers. Counts Six through Eight claim that if I-137 is held to be valid and enforceable, it has effected a permanent taking for which Plaintiffs are entitled to just compensation. Counts Nine and Ten claim that if I-137 is held to be invalid or unenforceable, it has effected a temporary taking for which just compensation is due. Count Eleven claims that the State breached its contractual assurance that Plaintiffs would receive a decision on its permit application and that the State would not change the decisional statutes prior to reaching

such a decision. Lastly, Count Twelve claims that the State breached its covenant of good faith and fair dealing. In an Amended Complaint, Plaintiffs added Counts Thirteen and Fourteen. Count Thirteen seeks judicial review of the DNRC's administrative decision affirming the termination of the primary term of Plaintiffs' mineral leases. Count Fourteen seeks a declaration that this administrative decision constituted a breach of the State's contractual obligations to Plaintiffs and seeks specific performance of these obligations.

The State has filed a motion to dismiss or in the alternative for summary judgement with regard to all counts with the exception of Count Eight and the newly added Counts Thirteen and Fourteen. It is to that motion that the following discussion is directed.

STANDARD OF REVIEW

The parties contest the appropriate standard this Court should use in reviewing the State's motion. The State argues that, with regard to Count One, Counts Four through Seven, and Counts Nine through Twelve, the standards governing the determination of a motion to dismiss are appropriate because it is relying only on the complaint and documents whose contents are alleged in the complaint and whose authenticity no party questions. With regard to Counts Two and Three, the Plaintiffs' equal protection and due process claims, the State relies on material extraneous to the complaint and contends that therefore summary judgment standards should apply.

Plaintiffs argue that the State's entire motion must be adjudicated under the standards governing motions to dismiss. Plaintiffs maintain that the State has not presented a justiciable motion for summary judgment because it has failed to carry its initial burden of demonstrating with appropriate evidence that no genuine issues of material fact

exist. At this point, Plaintiffs' argument about whether or not the State has carried its burden of proof with regard to its motion for summary judgment on Counts Two and Three is premature. This is not an argument about the applicable standard of review, but rather an argument about the merits of the State's motion — whether the State has carried its summary judgment burden.

The State's motion with regard to Counts Two and Three will be reviewed pursuant to summary judgment standards to determine whether the State has proven that there are no issues of genuine fact and whether it is entitled to judgment as a matter of law. *See* Rule 56, M.R.Civ.P.; *Lewis v. Puget Sound & Light Co.*, 306 Mont. 37, 40, 29 P.3d 1028, 1031 (2001). The State's motion with regard to Count One, Counts Four through Seven, and Counts Nine through Twelve will be reviewed pursuant to the standards governing motions to dismiss. That is, the State's motion will be construed in a light most favorable to the Plaintiffs and will not be granted unless it appears beyond a doubt that the Plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. *See, e.g., Hilands Golf Club v. Ashmore*, 277 Mont. 324, 328, 922 P.2d 469, 471-72 (1996). In considering this motion, all allegations of fact contained in Plaintiffs' complaint will be taken as true. *Id.*

DISCUSSION

I. Summary Judgment: Counts Two and Three

In Counts Two and Three, Plaintiffs claim that I-137 has deprived them of their property rights in violation of their right to substantive due process and has deprived them of their right to equal protection of the laws as guaranteed by the Montana Constitution. Plaintiffs' allegations supporting each claim are essentially the same. Plaintiffs contend that I-137 is unnecessary because compliance with existing constitutional and statutory requirements governing surface

mining and cyanide leaching would have been sufficient to prevent any unacceptable impacts to Montana's environment associated with these activities. Plaintiffs also claim that I-137 is arbitrary in that it does not completely prohibit open-pit mining nor does it completely prohibit cyanide leaching, but rather only prohibits the cyanide leaching of gold and silver ore that has been extracted from an open-pit mine, and then only from those mines that were not operating under an existing permit as of November 3, 1998. They insist that I-137 was specifically intended to prevent the permitting of the McDonald Project. Plaintiffs also maintain that I-137 operates retrospectively in that it imposed new liabilities with regard to transactions or considerations already undertaken.

A. Count Three: Equal Protection

The first step in an equal protection analysis is to identify the classes involved and determine whether they are similarly situated. *See, e.g., Henry v. State Comp. Ins. Fund*, 294 Mont. 449, 455, 982 P.2d 456, 461 (1999). The next step is to determine the appropriate level of scrutiny. If a suspect classification or fundamental right is involved, the legislation is strictly scrutinized. *E.g., Matter of S.L.M.*, 287 Mont. 23, 33, 951 P.2d 1365, 1371 (1997). If the right in question has its origins in the Montana Constitution, but is not found in the Declaration of Rights, middle-tier scrutiny applies. *Butte Cmty. Union v. Lewis*, 219 Mont. 426, 712 P.2d 1309 (1986). Lastly, if neither of the above two situations is present, the legislation is evaluated using the rational basis test. *Henry*, 294 Mont. at 456, 982 P.2d 461.

Plaintiffs contend that I-137 creates four similarly situated classes: (1) proposed open-pit gold and silver mines like the McDonald Project that use cyanide leaching; (2) existing open-pit gold and silver mines that use cyanide leaching; (3) underground gold and silver mines that use cyanide leaching; and (4) mining operations that use cyanide leaching but do not mine gold or silver. Plaintiffs assert that

all classes are similarly situated in that they each use or propose to use cyanide leaching, but that only the first class, proposed open-pit gold and silver mines, is arbitrarily singled out for adverse treatment. The State does not dispute the Plaintiffs' characterization of the classes created by I-137.

With regard to the appropriate level of scrutiny, Plaintiffs make no reasonable argument that the actual classifications created by I-137 are suspect, infringe on a fundamental right, or infringe on some other constitutional right not contained in Montana's Declaration of Rights.[2] Companies who open-pit mine for gold and silver and choose to use cyanide leaching simply are not a suspect class, nor can mining in such a manner be considered a fundamental right. Accordingly, I-137 must only pass rational basis scrutiny. Rational basis scrutiny requires this Court to determine: (1) whether the legislation in question is related to a legitimate governmental concern; and (2) whether the means chosen by the legislature to accomplish its objective are reasonably related to the result sought to be attained. *Henry*, 294 Mont. at 457, 982 P.2d at 462.

In determining whether the legislation in question is related to a legitimate governmental concern, the Montana Supreme Court has stated: "The purpose of the legislation

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[2] Plaintiffs allege that because of the circumstances surrounding the enactment of I-137, namely the general limitations on corporate political contributions found unconstitutional in *Mont. Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000), the appropriate level of scrutiny should be strict. We do not see how contribution limitations applicable to all corporations, including all mining corporations, during the election cycle in which I-137 was passed could possibly establish that the classifications created by I-137 are suspect or infringe on a fundamental right. The level of scrutiny will be determined with reference to the classes created or rights allegedly infringed by the challenged legislation.

does not have to appear on the face of the legislation or in the legislative history, but may be *any possible purpose of which the court can conceive.*" *Stratemeyer v. Lincoln County*, 259 Mont. 147, 152, 855 P.2d 506, 510 (1993) (reviewing equal protection challenge pursuant to rational basis test) (emphasis added).

The State contends that the purpose of I-137 is to prevent or reduce the release of cyanide into the natural environment, noting that "no dispute exists that cyanide heap leaching . . . has the potential to cause severe environmental degradation." Both parties agree that the State may legitimately legislate to control the adverse effects of environmental pollutants. *See* Pls.' Reply Br., at 8. However, Plaintiffs maintain that the State has "not bothered to describe in any detail what the legitimate legislative purpose of I-137 was or the factual basis for it." There is no serious doubt that the release of cyanide into the environment may result in adverse environmental consequences, not even Plaintiffs contest this. The purpose of I-137 needs no further factual development — not only would I-137 be devoid of any significant legislative history given that it was enacted as an initiative, but, more importantly, the purpose of I-137 can be any possible legitimate purpose of which this Court can conceive. Rational basis scrutiny requires nothing more. *See, e.g.*, *Stratemeyer*, 259 Mont. at 152, 855 P.2d at 510. This Court is satisfied with the State's proffered purpose.

As a result, summary judgment is proper with regard to Plaintiffs' equal protection claim if the prohibition on new open-pit gold and silver mines that use cyanide leaching is reasonably related to the purpose of controlling the adverse environmental effects of cyanide. Plaintiffs contend that the classification chosen, new open-pit gold and silver mines that use cyanide leaching, is arbitrary. Plaintiffs note that although new mines are prohibited, existing open-pit gold and silver mines that use cyanide leaching are expressly

excluded from the prohibition, as well as underground gold and silver mines that use cyanide leaching, and those mining operations which do not mine for gold and silver but do use cyanide leaching. Plaintiffs contend these classes are all similarly situated in that they all use cyanide leaching, but that the State has arbitrarily chosen to single out one class, proposed open-pit gold and silver mines, for adverse treatment. Plaintiffs argue that the State has failed to provide any empirical evidence supporting these classifications.

Plaintiffs appear to be unaware of the great deference accorded legislative decision-making under the rational basis test. As the United States Supreme Court has stated with regard to the federal counterpoint to Montana's guarantee of equal protection:

> [R]ational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. Nor does it authorize the judiciary to sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification. *Instead, a classification must be upheld against equal protection*

> *challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.*
>
> A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. A statute is presumed constitutional and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific.

Heller v. Doe, 509 U.S. 312, 319-21, 113 S. Ct. 2637, 2642-43, 125 L Ed.2d 257 (1993) (citations and quotations omitted) (emphasis added).

The Court will address each classification separately. First, in distinguishing between gold and silver mines and other types of mines that use cyanide leaching, the State argues that the determination to focus on gold and silver mining is unremarkable given that it has been recognized as the mining sector where cyanide leaching is quite extensive

and where, not unexpectedly, the environmental impact of cyanide use is pronounced. In support of this argument, the State has submitted two documents produced by the Federal Environmental Protection Agency (EPA). Plaintiffs have not contested the relevance or authenticity of either document. Accordingly, this Court takes judicial notice of both. *See* Rule 201(b), M.R.Evid. The "Profile of the Metal Mining Industry," published in September 1995 as part of EPA's Sector Notebook Project, identifies cyanide leaching as the primary technique used to process gold and silver ore. Office of Compliance, Environmental Protection Agency, *Profile of the Metal Mining Industry*, 25 and 28 (Sept. 1995) ("cyanide is . . . consumed in massive quantities by the gold industry"). Cyanide leaching is not identified as the primary method or even one of the principal methods used in the processing of any other metal ore. See *Profile*, at 20-25 (discussing beneficiation processes used for iron, copper, lead, zinc, gold and silver ores). The State has articulated a reasonably conceivable set of facts supporting I-137's distinction between gold and silver mining and other types of mining for purposes of eliminating or reducing the potential of cyanide pollution. Plaintiffs have not offered any evidence undermining these facts.

Second, in distinguishing between open-pit and underground mines that use cyanide leaching, the State suggests that the legislature could have reasonably concluded that significant commercial underground gold and silver mining would not be undertaken in Montana in the foreseeable future and therefore no need existed to proscribe such activity in the future. Citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S. Ct. 715, 66 L.Ed.2d 659 (1981), the State observes that it is not required to "strike at all evils at the same time or in the same way" but may implement its program step by step "adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." 449

U.S. at 466 (upholding Minnesota law which banned plastic milk containers but did not ban non-plastic nonreturnable containers). This Court also notes that in the "*Profile of the Metal Mining Industry*" the EPA observes that open-pit mining is the primary domestic source of gold and silver, the metal ores typically associated with cyanide leaching. *Profile*, at 17, 25. Thus, there are facts supporting I-137's distinction between open-pit mines which use cyanide leaching and underground mines using the same process. Plaintiffs have not countered with any evidence which belies the rational basis for this distinction.

Lastly, in distinguishing between proposed and existing open-pit mining using cyanide leaching, the State argues that the legislature could have reasonably determined that the economic disruption caused by shutting down operating open-pit gold and silver mines which employ cyanide leaching warranted allowing those facilities to continue production. Once again, this is a reasonably conceivable state of facts which supports I-137's distinction between new and existing open-pit mines. Plaintiffs have not forwarded any evidence discounting the rationality this distinction.

Plaintiffs have failed to carry their burden of proving the existence of genuine issues of material fact regarding the rationality of the classifications contained in I-137. The State is entitled to summary judgment with respect to Count Three which is hereby dismissed with prejudice.

B. Count Two: Substantive Due Process

As the State observes, the substantive due process analysis is, for present intents and purposes, the same as the equal protection analysis. Both analyses require this Court to determine: (1) whether the legislation in question is related to a legitimate governmental concern; and (2) whether the means chosen by the legislature to accomplish its objective

are reasonably related to the result sought to be attained. *Compare Plumb v. Fourth Jud. Dist. Ct.*, 279 Mont. 363, 372, 927 P.2d 1011, 1016 (1996) (substantive due process); *with Henry*, 294 Mont. at 457 (equal protection).

The legitimate public purpose of I-137 is, as discussed above, to prevent or reduce the adverse effects of cyanide on Montana's natural environment. Plaintiffs contend that the prohibition against new open-pit gold and silver mines using cyanide leaching is not reasonably related to the purpose of I-137 because compliance with existing constitutional and statutory requirements governing surface mining and cyanide leaching would have been sufficient to prevent any unacceptable impacts to Montana's environment associated with these activities. This claim is not worthy of further examination. As the State correctly observes, it would be entirely reasonable for the citizens of Montana and the legislature to conclude that, although existing laws might reduce the possibility of environmental harm from the release of cyanide, the most effective method of further reducing or eliminating that possibility is to prohibit the chemical's use.

Plaintiffs also argue that they have a vested constitutionally protected property right in the state mineral leases which they own and that I-137 has a retroactive effect in that it prohibits the development of these leases. Plaintiffs assert that they have worked with the State during the permitting process, spending millions of dollars and entering multiple contractual relationships to advance this process. The State responds that I-137 operates in a wholly prospective fashion, only prohibiting those open-pit gold and silver mines using cyanide leaching processes which were not permitted at the time of its enactment. Section 82-4-390(2), MCA.

An impermissibly retroactive law is one which "takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a

new disability in respect to transactions already passed." *Wallace v. Mont. Dept. of Fish, Wildlife & Parks*, 269 Mont. 364, 367-68, 889 P.2d 817, 819-20 (1995)). In *Wallace*, the Montana Supreme Court held that a license is a privilege to which the applicant is not entitled until such time as the licensing authority acts on the application. *Wallace*, 269 Mont. at 368, 889 P.2d at 828. The *Wallace* Court affirmed the denial of the Wallaces' application for an expansion of their game farm, when the denial was based on a change in the permitting law which occurred after the Wallaces submitted their application.

As in *Wallace*, Plaintiffs did not acquire a vested right to open-pit mine gold and silver using cyanide leaching merely because they had submitted an application seeking an operating permit to do so. Whether I-137 actually impaired Plaintiffs' rights is more appropriately considered pursuant to Plaintiffs' takings and contract-based claims discussed below. Summary judgment in favor of the State with regard to Plaintiffs' substantive due process claim is warranted. Count Two is hereby dismissed with prejudice.

II. Motion to Dismiss: Counts One, Four through Seven, Nine through Twelve

A. Count One: Initiative Requirements

In Count One, Plaintiffs claim that the text of I-137 was not presented to the electorate in the bill form provided in the most recent issue of the bill drafting manual as required by Section 13-27-201, MCA. Plaintiffs note that the drafters correctly presented the bill to Legislative Services, who informed them that it lacked a codification instruction, but that the drafters opted not to conform the text to Legislative Services' recommendations. The State moves to dismiss, arguing that this issue has been mooted by the subsequent legislative codification of I-137. On the merits, the State argues: (1) the laws governing the presentation of

ballot issues encourage liberal allowance of citizen initiated legislation, requiring only "substantial" compliance; (2) pursuant to Section 13-27-202(1), MCA, the recommendations of Legislative Services do not have to be accepted; and (3) statutes have been enforced with patently incorrect codification instructions. Plaintiffs respond that the State's motion to dismiss is premature because the bill drafting manual and the correspondence between the drafters and Legislative Services are not before the Court.

The essence of Plaintiffs' claim is that I-137 is invalid because it lacked a proper instruction concerning where it was to be codified. Even if this allegation is true, Plaintiffs will be unable to invalidate I-137 on this basis. As the State notes, a petition for an initiative must be "substantially" in the form provided by the Montana Code Annotated and that "[c]lerical and technical errors that do not interfere with the ability to judge the sufficiency of signatures on the petition do not render a petition void." Section 13-27-201, MCA. The lack of a codification instruction does not relate to the substance of I-137. Under the circumstances, a merely faulty or completely missing codification instruction certainly cannot be relied upon to invalidate the will of the electorate in passing I-137. The State's motion to dismiss Count One is granted.

B. Counts Four, Eleven, and Twelve: Contract-Based Claims.

In Count Four, Plaintiffs allege that I-137 unconstitutionally impairs contractual obligations in violation of the Montana and Federal Constitutions. The contract clauses of the Montana and United States Constitutions have generally been interpreted as "interchangeable guarantees against legislation impairing the obligation of contract." *Carmichael v. Workers' Comp. Ct.*, 234 Mont. 410, 414, 763 P.2d 1122, 1125 (1988). This Court employs a three-part test when analyzing a contract clause challenge: Is the state law

a substantial impairment to the contractual relationship? If so, does the State have a significant and legitimate purpose for the law? And lastly, does the law impose reasonable conditions which are reasonably related to achieving the legitimate and public purpose? *Id.*

In resolving the State's motion to dismiss Count Four, the first issue is whether beyond a doubt there are no set of facts under which Plaintiffs could prove that I-137 substantially impairs their contractual relationship with the State. The State argues that pursuant to the express terms of its leases with the State, Plaintiffs agreed to abide by subsequent environmental regulations. Thus, the State maintains, Plaintiffs' contract only granted them the right to mine for gold and silver in accordance with all applicable regulations in effect at the time of mining, which would include regulations prohibiting surface mining with cyanide leaching. Plaintiffs concede that they agreed to abide by environmental regulations in effect at the time they carried out mining activities and to any and all laws governing the manner in which such operations were to be conducted. However, Plaintiffs argue that I-137 completely abrogated the leases by prohibiting them from conducting the very activity which both parties recognized to be the only reason for entering the leases.

Basically, Plaintiffs appear to be contending that while they did agree to abide by subsequent regulations, they did not agree to abide by subsequently enacted legislation which completely prohibited the sole activity contemplated by their agreement. Turning our attention to the leases, the leases provide that, in consideration for annual rent payments, the State leases the land to the Plaintiffs for the purpose of mining gold, silver and other associated minerals. Paragraph 7 of the Plaintiffs' leases with the State provides: "The lessee shall fully comply with all applicable state and federal laws, rules and regulations, including but not limited

to those concerning safety, environmental protection and reclamation." Plaintiffs concede that pursuant to this provision they agreed to abide by environmental regulations in effect at the time they carried out mining activities.

A law which restricts a party to gains reasonably expected from a contract is not a substantial impairment. *Carmichael*, 234 Mont. at 414, 763 P.2d at 1125. Where the language of an agreement is clear and unambiguous and, as a result, susceptible to only one interpretation, the duty of the court is to apply the language as written. *Carelli v. Hall*, 279 Mont. 202, 209, 926 P.2d 756, 761 (1996). Whether or not an ambiguity exists is a question of law for the court to decide. *Id.* Only where an ambiguity exists may the court turn to extrinsic evidence of contemporaneous or prior oral agreements to determine the intent of the parties. *Id.* If the terms of the contract are clear, however, "there is nothing for the courts to interpret or construe" and the court must determine the intent of the parties from the wording of the contract alone. *Wray v. State Comp. Ins. Fund*, 266 Mont. 219, 223, 879 P.2d 725, 727 (1994).

As is clear from the language of the leases, the parties intended that Plaintiffs would have the right to mine for gold and silver during the lease term subject to "*all* applicable state and federal laws, rules and regulations, *including but not limited to those concerning . . . environmental protection*." (Emphasis added.) 1-137 is a state regulation concerning mining and environmental protection. Plaintiffs concede that the leases subjected them to subsequently enacted mining regulations. Furthermore, the leases do not grant Plaintiffs the right to mine using any one particular method. From the foregoing, this Court can only conclude that, at least at the time Plaintiffs accepted the leases, Plaintiffs should have reasonably expected that they would be subject to any future mining or environmental regulations,

including regulations prohibiting surface mining of gold and silver combined with cyanide leaching of the ores.

The agreement expressed by these written leases could only be subsequently altered by "a contract in writing or by an executed oral agreement, and not otherwise." Section 28-2-1602, MCA. On August 26, 1994, the leases were amended pursuant to a written agreement entitled "Mineral Lease Amendment Agreement" (Amendment Agreement). Plaintiffs contend that documents prepared by the DNRC in conjunction with the execution of this Amendment Agreement explicitly state that the object of the leases was the surface mining of gold and silver with cyanide leaching. Paragraph 6 of the Amendment Agreement provides "as expressly amended hereby, the Mineral Leases shall remain in full force and effect according to their terms." After a quick perusal of the Amendment Agreement, this Court is unaware of any express agreements therein which excuse Plaintiffs from subsequently enacted mining or environmental regulations or guarantee the permitting of any particular mining operation. It is unlikely Plaintiffs will be able to prove that their contractual rights were substantially impaired; they apparently agreed to accept the risk of future regulatory changes. However, without further briefing regarding the intent and effect of the parties' various subsequent agreements, this Court is hesitant to dismiss Plaintiffs' claim at this stage. Accordingly, the State's motion to dismiss Count Four is denied. For similar reasons, the State's motion to dismiss Counts Eleven and Twelve, in which Plaintiffs maintain a breach of contract claim and a breach of an implied covenant claim, is also denied.

C. Count Five: Police Power

In Count Five, Plaintiffs allege that I-137 is in violation of the "inherent limits" on Montana's legislative police power. In response to the State's motion to dismiss, Plaintiffs contend that I-137 is illegitimate because "there is

an inadequate relationship between the statute in question and what otherwise maybe a valid objective of the statute." In support of this contention, Plaintiffs make their equal protection argument that I-137 arbitrarily treats members of the class "users of the cyanide leaching process" differently. Plaintiffs concede that their claim is not based on the "public use" criteria of Article II, section 29 of the Montana Constitution. The State moves to dismiss noting that this claim is essentially another stab at Plaintiffs' equal protection and substantive due process claims.

Plaintiff's "police powers" claim adds nothing to their complaint; it is simply a restatement of their other constitutional claims. The State's motion to dismiss with respect to Count Five is granted.

D. Counts Six, Seven, Nine, and Ten: Takings Claims

Counts Six through Ten are all takings claims of one sort or another. Counts Six through Eight are "permanent takings" claims.[3] In these claims, Plaintiffs allege that in the event this Court determines that I-137 is valid and enforceable, it has taken from Plaintiffs their ability to produce and sell gold and silver from the lands comprising the McDonald Project, Keep Cool Project, and Seven-Up Project. Conversely, Counts Nine and Ten are "temporary takings" claims. In these claims, Plaintiffs allege that in the event this Court determines that I-137 is invalid, the State temporarily took their ability to produce and sell gold from

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[3] Count Six is on behalf of the Seven-Up Pete Venture; Count Seven is on behalf of Canyon Resources, the owner of Seven-Up Pete Venture; Count Eight is on behalf of the other named Plaintiffs in association with their interests in the Seven-Up Pete Project. The State has not moved to dismiss Count Eight.

the McDonald Project during the time that the State enforced I-137.

Article II, section 29 of the Montana Constitution provides that private property shall not be taken for public use without just compensation. The scope of Montana's constitutional takings protections has been determined with reference to decisions interpreting federal takings protections. *See Kudloff v. City of Billings*, 260 Mont. 371, 860 P.2d 140. This provision protects private property owners from absolute conversion, by way of condemnation, as well as uncompensated takings of property by way of regulation. *See Pa. Coal Co. v. Mahon*, (1922), 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed.2d 322. With regard to regulatory takings, courts have had little success in devising any set formula for determining when governmental regulation of private property amounts to a taking. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 771-72 (9th Cir. 2000). The United States Supreme Court has identified two specific circumstances in which a government regulation is categorically a taking: (1) regulations that compel a property owner to suffer a permanent physical "invasion" or "occupation" of his or her property, *see, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S.Ct. 3164, 3171, 73 L.Ed.2d 868 (1982); and (2) regulations that deny "all economically beneficial or productive use of land," *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893, 120 L.Ed.2d 798 (1992). *See generally Tahoe-Sierra*, 216 F.3d at 772-73. In the absence of a categorical taking, the Supreme Court has repeatedly recognized that "whether a particular restriction [amounts to a taking] depends largely upon the particular circumstances [of each] case." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978) (quotation omitted). In this regard, the Supreme Court and lower courts have

indicated that most regulatory takings cases should be resolved by balancing the public and private interests at stake, with three primary factors weighing in the balance: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. *Tahoe-Sierra*, 216 F.3d at 771-72 (citing *Penn Central*, 438 U.S. at 124,98 S.Ct. at 2659).

Essentially, the State's argument with respect to these counts is the same as its argument with respect to Plaintiffs' unconstitutional impairment of contract claim. The State contends that, to the extent the Plaintiffs' takings claims arise out of their leases with the State, they should be dismissed because those leases do not grant a property right to develop the mineral estate in any specific manner. Rather, the right to develop the mineral estate as described by the leases was conditioned in a number of ways, including requiring the lease-holder to comply with all environmental laws and to secure approval of DEQ prior to any surface disturbing activity. Thus, because the leases did not grant Plaintiffs a property right to develop the mineral estate as an open-pit mine using cyanide leaching, I-137 could not have taken a property right.

As the State correctly maintains, even if Plaintiffs contend that the regulation deprived them of all economically beneficial use, the logical antecedent inquiry is whether the proscribed use was part of Plaintiffs' title to begin with. *See Lucas*, 505 U.S. at 1027. Plaintiffs' title is described by the leases themselves and any written modification agreements or executed oral agreements. *See* Section 28-2-1602, MCA. As described more fully above, the lease agreements themselves do not provide for surface mining with cyanide leaching, but rather only grant the right to mine for gold and silver subject to applicable regulations and the acquisition of the necessary permits. The Amendment Agreement does not

appear to excuse Plaintiffs from subsequent regulations nor to guarantee the permitting of any particular mining operation. However, without further briefing regarding the intent and effect of the various agreements entered subsequent to the lease agreements, this Court is hesitant to dismiss these claims at this stage. Accordingly, the State's motion to dismiss Counts Six, Seven, Nine, and Ten is denied.

CONCLUSION

IT IS HEREBY ORDERED that the State's motion is GRANTED in part and DENIED in part. The State's motion is GRANTED with respect to Counts One, Two, Three, and Five. These counts are hereby dismissed with prejudice. The State's motion is DENIED with respect to Counts Four, Six, Seven, Nine, Ten, Eleven, and Twelve. Also, the Court notes that Counts Eight, Thirteen, and Fourteen were not subject to the State's motion and thus still stand.

DATED this 1 day of November, 2001.

/s/ JEFFREY M. SHERLOCK
District Court Judge

pc. Alan L Josecelyn
Randy L. Parcel
Mike McGrath/Candace F. West
G. Martin Tuttle
Tommy H. Butler
Karl J. Englund

(3)

No. 05-588

In The Supreme Court of the United States

SEVEN UP PETE VENTURE, an Arizona General Partnership, d/b/a SEVEN UP PETE JOINT VENTURE, CANYON RESOURCES CORPORATION, a Delaware Corporation, JEAN MUIR, DR. IRENE HUNTER, DAVID MUIR, ALICE CANFIELD, TONY PALAORO, JUNE E. ROTHE-BARNESON, AMAZON MINING COMPANY, a Montana Partnership, PAUL ANTONIOLI, STEPHEN ANTONIOLI, and JAMES E. HOSKINS,

Petitioners,

v.

THE STATE OF MONTANA,

Respondent.

On Petition For A Writ Of Certiorari To The Montana Supreme Court

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether mineral leases and associated agreements, conditioned upon full compliance with all applicable state and federal laws and discretionary state regulatory approval of mining operations, are "property" protected under the Takings Clause against subsequently enacted environmental protection laws.

2. Whether the rule requiring heightened scrutiny, under the Contracts Clause, of legislation benefiting a state's financial self-interest should be extended to legislation that financially disadvantages the state but furthers important state interests in environmental health and safety.

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In addition to the unofficial report cited in the Petition for Certiorari, the Montana Supreme Court decision is cited in the official Montana Reports at 327 Mont. 306 (2005).

STATEMENT OF THE CASE

1. In 1986 the State of Montana, through its Department of State Lands (DSL), entered into six mineral leases with the predecessor in interest to the principal petitioner Seven Up Pete Venture (Venture). Each mineral lease ran for a primary term of ten years, and as long thereafter as the Venture produced minerals in paying quantities "and all other obligations are fully kept and performed." Pet. App. 4a-5a, ¶¶ 8-9. No lease specifically authorized or mentioned a particular method of mining. Pet. App. 42a.

Each lease provided that "the lessee shall fully comply with all applicable state and federal laws, rules and regulations, including but not limited to those concerning safety, environmental protection and reclamation." Each lease authorized mining on any parcel of the leased premises "provided that the [Venture] has first procured the applicable Permits under the Metal Mine Reclamation Act." Pet. App. 17a, ¶ 31. Each lease incorporated an additional term that "no activities shall occur on the tract until an Operating Plan or Amendments have been approved [by the State.]" Pet. App. 5a, ¶ 9.

2. After obtaining the mineral leases in 1991, the Venture took steps to seek regulatory approvals necessary

to mine under the leases, including preparation of an environmental impact statement (EIS) under the Montana Environmental Policy Act, Mont. Code Ann. § 75-1-201 *et seq.*, and application for a mine operating permit under the Montana Metal Mine Reclamation Act, Mont. Code Ann. § 82-4-301 *et seq.* Pet. App. 5a-6a, ¶ 10.

a. In 1993, the Venture entered a Memorandum of Agreement with the DSL regarding the preparation of an environmental impact statement (EIS) for mining operations on both leased and owned lands known collectively as the "McDonald Project." The Memorandum recited that "the proposed Project would utilize . . . heap leaching to extract gold, silver, and other trace metals from ore." A series of contract modifications pertaining to work preparing the EIS followed. None of these EIS-related agreements altered the Venture's duties under the mineral leases. Pet. App. 5a-6a, ¶¶ 10, 12.

In 1994, the Venture applied to the DSL for an operating permit to construct and operate the McDonald Project as a surface mine using cyanide leaching for gold and silver. Pet. App. 6a, ¶ 12. The leases contemplated the operating permit requirement, and recited the applicable standard:

> [The State] shall not approve the Plan until the Lessee has met reasonable requirements to prevent soil erosion, air and water pollution, and to prevent unacceptable impacts to vegetation, wildlife, wildlife habitat, fisheries, visual qualities and other resources. . . . No work will be conducted without written approval of the Operating Plan.

Pet. App. 16a-17a, ¶ 30.

b. By 1994 it was becoming apparent that, due to the scale and complexity of the McDonald Project, neither the EIS nor the operating permit application process would be complete before the approaching expiration in 1996 of the ten-year primary term for the mineral leases. Therefore, in August 1994, the Venture entered a Mineral Lease Amendment Agreement with the DSL to toll the expiration of the remaining seventeen months of the lease term on the condition that the Venture "actively pursue" an operating permit. The Amendment further provided that "except as expressly amended hereby, the Mineral Leases shall remain in full force and effect according to their terms." Pet. App. 6a, ¶ 11.

c. In July 1998, after the Venture's failure to pay fees relating to services provided by third parties in preparation of the EIS, the Montana Department of Environmental Quality (DEQ, successor agency to the DSL's environmental regulatory duties) issued a stop-work order on the McDonald Project EIS. In September 1998, the Montana Department of Natural Resources and Conservation (DNRC, successor agency to the DSL's leasing duties) notified the Venture that the unexpired seventeen months of the mineral leases' primary term would begin to run again due to the Venture's failure to actively pursue the permitting process. Pet. App. 7a, ¶ 13.

The Venture paid the past-due balance in December 1998, but failed to fund a standing account balance for future work on the uncompleted EIS, or take other steps necessary to reactivate the permitting process. In February 2000, after the remaining seventeen months of the primary lease term had run, the DNRC notified the Venture that the mineral leases had terminated of their own accord. Pet. App. 7a-8a, ¶ 15. The Venture took no

action to further the permitting process, and did not address the pending termination of the mineral leases until they requested an administrative hearing on March 9, 2000, two weeks after the leases expired. Pet. App. 33a-35a, ¶¶ 59-62.

3. Meanwhile, in November 1998, Montana voters approved Initiative 137 (I-137) a statewide ban on open-pit mining for gold and silver using the cyanide heap leaching process, codified at Mont. Code Ann. § 82-4-390. Section 2 of I-137 excluded from the prohibition any mine operating under an existing operating permit as of November 3, 1998. Because the Venture had never obtained an operating permit for the McDonald Project, it was subject to the prohibition. Pet. App. 7a, ¶ 14.

4. On April 11, 2000, petitioners filed a complaint in the United States District Court for Montana, alleging among other claims that I-137 worked an unconstitutional taking of private property without just compensation in violation of the Fifth Amendment of the United States Constitution, and that I-137 unlawfully impairs the obligation of contracts between petitioners and the State of Montana in violation of Article I, Section 10 of the United States Constitution. The federal district court stayed its consideration of the Contracts Clause claim under *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411 (1964), and dismissed without prejudice petitioners' taking claims as unripe under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). As petitioners concede at the outset of their petition, they have attempted to revive their claims in the federal district court case, and notwithstanding their petition they have opposed the State of Montana's

motion to dismiss that action. Pet. App. 8a, ¶ 16; Pet. 6 n.1, 14 n.2.

5. The same day that petitioners filed their federal complaint, they filed a complaint in state district court alleging twelve separate counts, including claims under the federal and state contracts clauses, and the state takings clause. Pet. App. 48a, 55a-56a. On December 9, 2002, the state district court granted the State's motion for summary judgment on the contract clause and takings claims. Pet. App. 55a, 58a.

a. The district court rejected the contract clause claims, finding that "[n]one of the written contracts between these parties obligates the state of Montana to allow open-pit mining along with cyanide heap-leaching on the land subject to mineral leases." The court added that "[w]hile this may have been what the Venture intended, the state of Montana nowhere agreed to allow such a proposal." Pet. App. 51a. Indeed, "the written contract between the parties acknowledged that there might be a change [in environmental regulations] and, if there was, that the Venture would be subject to any such change." Pet. App. 55a. Alternatively, the court also held that environmental protection was a significant and legitimate purpose to which I-137 was reasonably related. Pet. App. 53a-55a.

b. The court also rejected the takings claims, holding that "[t]he Venture did not have a property right to conduct [open-pit cyanide heap-leach mining] on the leases here in question." Nor had the Venture "even obtained a[n] operating permit to mine, and its activities were subject to all environmental regulations." Additionally, the court noted that "I-137 does not affect the Venture's other

potential uses of the mineral leases or a way to exp' it them." Pet. App. 58a.

6. The Montana Supreme Court affirmed. Pet. App. 3a.

a. On appeal, petitioners argued that they "had a property right in 'the opportunity for a favorable ruling on its mining permit application' which existed prior to the passage of I-137." Pet. App. 10a ¶ 22.

Relying upon settled Montana law, the court held that "a lessee of state lands has no right to engage in mining operations until an operating permit has been obtained." Pet. App. 13a, ¶ 27. The court then recounted the pervasive conditional language contained in both the applicable permitting regulations and the mineral leases themselves, concluding "that the Venture's 'opportunity' to seek a permit, which required convincing the State that this cyanide leaching project was appropriate, did not constitute a property right." Pet. App. 14a-18a, ¶¶ 29-32.

b. In challenging the rejection of their state and federal contract clause claims, petitioners asserted that their various agreements "demonstrate that [they] never agreed to be bound to future laws which would completely ban the use of cyanide heap leaching process, and that I-137 therefore substantially impaired [their] contractual agreements." Pet. App. 23a, ¶ 42.

The Montana Supreme Court analyzed petitioners' contract clause claim under the three-step inquiry this Court conducted in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-13 (1983), noting that the case has repeatedly provided guidance in previous Contract Clause matters. Pet. App. 22a, ¶ 41 n.16.

Contrary to the district court's finding, the supreme court found a substantial impairment of contract because "the Venture's contractual relationship with the State was nonetheless based on the assumption, held by all parties, that the cyanide heap method would be used." Pet. App. 25a, ¶ 45. However, citing the Montana Constitution's guarantee of "the right to a clean and healthful environment," Mont. Const. Art. II, § 3, the court concluded that I-137 "is based on the significant and legitimate public purpose of protecting the environment." Pet. App. 26a, ¶ 46. The court also held I-137 to be reasonably related to that purpose "[i]n consideration of the acknowledged risks associated with the use of cyanide heap leaching, and the expressed concerns about the inadequacy of existing laws." Pet. App. 28a, ¶ 50. Although petitioners urged the court to apply heightened scrutiny to I-137 based on their assertion that it benefited the State's self-interest, the court refused because Montana's financial contractual interests were actually diminished by I-137, as it "caused the State to forego the opportunity to receive royalty payments estimated at $5 million annually over the production life of the mining operation, which was expected to be twelve years." Pet. App. 27a, ¶ 47.

ARGUMENT

The decision of the Montana Supreme Court is a sound application of this Court's Contracts Clause and Takings Clause analysis to contract and property rights rooted in Montana law. As such, the decision does not conflict with any decision of this Court, any court of appeals, or any other state court of last resort. Further review is not warranted.

1. Petitioners first ask this Court to "decide whether realty and leases, which provided an opportunity for mining permits, are 'property' protected from uncompensated takings." Pet. 7. By their terms, the agreements at issue show that petitioners never had a vested right to mine using the cyanide heap-leach process.

a. As the principal case upon which petitioners rely explains, this Court's takings jurisprudence "has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). The dimensions of property interests "are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). There can be no compensable taking "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027.

Petitioners acknowledge that the property at issue is neither land nor leases, but "an opportunity for mining permits" on the land under the leases. This Court has recognized that mineral estates are a "unique form of property" over which the government, "as owner of the underlying fee title to the public domain, maintains broad powers." *United States v. Locke*, 471 U.S. 84, 104 (1985). Therefore, "[e]ven with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties." *Id.* at 104.

Here, the "bundle of rights" at issue includes the Montana mining laws, mineral leases, and subsequent agreements pertaining to the regulatory process and the lease terms. Montana law prohibits mining without an operating permit, something petitioners failed to obtain. Mont. Code Ann. § 82-4-335(1). The mineral leases themselves recited the broad discretion enjoyed by the State of Montana to impose "reasonable requirements to prevent soil erosion, air and water pollution, and to prevent unacceptable impacts to" natural resources. All other material agreements conditioned any mining activity upon general compliance with environmental protection laws and regulations as well as specific regulatory approvals, including an EIS and an operating plan. As the Montana Supreme Court found in its "essentially ad hoc, factual inquiries" into the interests involved, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), not one of the agreements, regulations, or laws applicable to petitioners since the inception of their mineral leases guaranteed them a right to mine, let alone a right to mine using the single mining process banned by I-137. In light of these express limitations on petitioners' rights under the mineral leases, the passage of I-137 by the people of Montana "did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Id.* at 125.

Petitioners' "opportunity for mining permits" also depended on their active pursuit of those permits, a pursuit the petitioners abandoned beginning in September 1998 (when the DNRC ended the tolling of the primary lease term), two months before the passage of I-137. "[T]his Court has never required the State to compensate

the owner for the consequences of his own neglect." *Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982) (holding lapse of mining interest "upon the failure of its owner to take reasonable actions imposed by law" is not a taking).

b. Petitioners allege the existence of a conflict both among federal appeals courts and between those courts and the Montana Supreme Court "regarding the constitutional standard governing landowner challenges to permit denials." Pet. App. 11. The purported circuit split involves the Montana Supreme Court's use of an analogy to substantive due process property interests it analyzed in *Kiely Constr. L.L.C. v. City of Red Lodge*, 2002 MT 241, 57 P.3d 836. Pet. App. 12a-13a, ¶ 26. According to petitioners, "[t]he cases cited in *Kiely* reveal conflicts among federal appeals courts," conflicts described in another substantive due process case, *George Washington Univ. v. District of Columbia*, 318 F.3d 203 (D.C. Cir.), *cert. denied*, 540 U.S. 824 (2003). Regardless of whether the question presented by *George Washington Univ.* may or may not newly merit review by this Court, however, neither *Kiely* nor a substantive due process claim is the subject of the instant petition.

The second conflict petitioners allege is between the Montana Supreme Court's decision and that of the Court of Appeals for the Federal Circuit in *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990). That case involved the federal government's subjection of plaintiff's completed mining plan, which met all then-existing regulatory requirements, to the arbitrary veto of an entirely separate (and never before officially involved) sovereign entity, the Navajo Tribe, for the sole purpose of "enabl[ing] the Tribe to exact additional money from a company with whom it had a valid contract." *Id.* at 1438.

Indeed, the Federal Circuit distinguished *United Nuclear* from two cases in which it found no taking because in those cases, as in this case, the government action formed part of the background of reasonable regulation to which all property rights are subject. *Id.* at 1437-38. The first involved a Presidential order barring the operation of nuclear reprocessing plants that threatened the proliferation of nuclear weapons. *Allied-General Nuclear Services v. United States*, 839 F.2d 1572 (Fed. Cir.), *cert. denied*, 488 U.S. 819 (1988). The second involved a federal law requiring a mine owner to spend large amounts of money to stabilize its uranium tailings. *Atlas Corp. v. United States*, 895 F.2d 745 (Fed. Cir.), *cert. denied*, 498 U.S. 811 (1990). These cases, like this case and unlike the pure financial exaction at issue in *United Nuclear*, rested upon an ancient takings principle:

> The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health . . . or the safety of the public, is not – and, consistently with the existence and safety of organized society, cannot be – burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain.

Mugler v. Kansas, 123 U.S. 623, 669 (1887), *cited in Allied General*, 839 F.2d at 1576; *see also M & J Coal Co. v. United States*, 47 F.3d 1148 (Fed. Cir.), *cert. denied*, 516 U.S. 808 (1995) (holding that, despite state's grant of mining permit to plaintiff, federal government's subsequent restriction on mining was not a taking.) The Federal Circuit's decisions support, rather than conflict with, the Montana Supreme Court's decision.

c. Petitioners' final argument for review of its takings claims is a request for this Court to "police state courts that may have a fiscal incentive to protect state coffers at the expense of private property." Pet. 14. Even setting aside the Montana Supreme Court's finding that I-137 deprived state coffers of millions of dollars of royalty income, this argument amounts to little more than a request for this Court to reconsider its opinion last term in *San Remo Hotel, L.P. v. City & County of San Francisco*, 125 S. Ct. 2491 (2005). As the Court then observed, "[i]t is hardly a radical notion to recognize that, as a practical matter, a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts." *Id.* at 2506. Particularly in the complex state administrative context of this case, "State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." *Id.* at 2507.

While petitioners may find that the federal district court will be unavailable to reconsider the federal claims decided by the Montana Supreme Court, the issues addressed and authorities relied upon show that the state court did, in fact, consider and decide petitioners' federal claims. Pet. App. 3a, ¶¶ 2-5. In any event, as petitioners concede, the federal district court already has granted them their desired federal forum to determine the preclusive effect of the Montana Supreme Court's decision under *San Remo Hotel*. Pet. 14 n.2. This Court need not intervene.

2. In seeking review of their Contracts Clause claim, petitioners invite this Court to expand the limited application of heightened scrutiny under the Contract Clause beyond financial contracts to include "all impairments by a state of its own contracts," even where, as here, the impairment works to the state's financial disadvantage. Pet. 15. Relying mainly on commentary with scant reference to the contracts and alleged impairment at issue, petitioners would abstract beyond its rationale the state financial self-interest rule of *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). Neither *United States Trust* nor this Court's subsequent application of the Contracts Clause leads to petitioners' conclusion. Absent any asserted conflict among lower courts or between the Montana Supreme Court and this Court, petitioners' Contracts Clause claim does not merit review.

a. *United States Trust* involved New Jersey's and New York's direct impairment of a debt obligation, a "purely financial" contract "the Court has regularly held that the States are bound by." 431 U.S. at 24-25. Rather than according its usual deference to the legislature, the Court carefully scrutinized the impairment to determine whether it "was both reasonable and necessary to serve the admittedly important purposes claimed by the state" because "a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors." *Id.* at 29. Deference to a state's justification of financial self-interest would be misplaced, for "[i]f a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *Id.* at

26. But the rule applies only in cases of financial benefit to the state; impairment even of a financial obligation would fall outside the reasoning of *United States Trust* if the impaired provision protected nonpecuniary interests similar to those served by I-137: "the State's promise to continue operating the [financed] facility . . . surely could not validly be construed to bind the State never to close the facility for health or safety reasons." *Id.* at 25.

Based upon the record at summary judgment, the Montana Supreme Court found that "[t]he passage of I-137 caused the State to forego the opportunity to receive royalty payments estimated at $5 million annually over the production life of mining operation which was expected to be twelve years." Pet. App. 27a, ¶ 47. Thus, the Court declined to apply the heightened financial self-interest standard of *United States Trust* because "though the State was a party to the contract, its interests as a contracting entity were actually diminished by I-137's passage." *Id.* Petitioners deride this finding as "simplistic" because "I-137 allowed it to regain – without paying any compensation – Petitioners' valuable and improved lease properties containing mineral deposits worth hundreds of millions of dollars." Pet. 18-19. Yet simply put, the mineral leases reverted to the State of Montana (by their terms) subject to the same regulations that petitioners claim rendered them valueless; whatever possible diminution in value the I-137 cyanide heap-leach process ban caused to the mineral estate, the public owner suffered the same as the private lessee. The fact that the State of Montana might have incurred losses to its own mineral wealth as a result of I-137, if true, would argue against heightened scrutiny, not for it. Petitioners therefore offer no plausible explanation of how I-137, a ballot measure enacted not by a legislature

to protect its appropriation capacity, but by the people themselves to protect their health and safety, serves the state of Montana's self-interest in such a way to subject it to heightened scrutiny under *United States Trust*.

b. A second important distinction between this case and those cases where a state's self-interest draws careful scrutiny is the general applicability of a police power exercise such as I-137, as opposed to the repeal of a specific financial covenant such as that involved in *United States Trust*. The ban on cyanide heap-leach processing "did not proscribe a rule limited in effect to contractual obligations or remedies, but instead imposed a generally applicable rule of conduct designed to advance a broad societal interest." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191 (1983) (quotation and citation omitted). The severance tax pass-through prohibition at issue in *Exxon* did not contravene the Contracts Clause because its effect on existing contracts "was incidental to its main effect" of protecting consumers. *Id.* at 192. Similarly, the "substantial sums of money" petitioners claim to have lost, Pet. App. 69a, were not due them by the terms of any contract they held with the state of Montana, but, like any investment involving a regulated matter, were subject to the incidental effect of a generally applicable law. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 416 (1983) (rejecting Contracts Clause challenge to law where "the contracts expressly recognize the existence of extensive regulation by providing that any contractual terms are subject to relevant present and future state and federal law.").

In addition to the "generally applicable rule" inquiry, "[t]he requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather

than providing a benefit to special interests." *Id.* at 412. The environmental protection measure enacted by I-137 serves more than a legitimate public purpose; it serves purpose of constitutional dimension under Montana's Constitutional guarantee of a "clean and healthful environment." Mont. Const. Art. IX, § 1(1); *Montana Environ. Info. Ctr. v. Department of Envir. Quality*, 1999 MT 248, ¶¶ 63-64, 988 P.2d 1236, 1246 (recognizing as fundamental the right to "clean and healthful environment," and imposing strict scrutiny to state action implicating that right).

c. Petitioners' moral and policy arguments to extend heightened scrutiny to all impairments of state contracts, Pet. 17-19, should fail. It is rather late in the day to read the terms of the Contracts Clause as imbued with absolute "notions of fairness" requiring that "*government must keep its word*," Pet. 17 (*citing* Laurence H. Tribe, *American Constitutional Law*, §§ 9-10 at 619 (2d ed. 1988)), its police power notwithstanding, or to insist that an "imperative that government accommodate private expectations by acting only pursuant to rules fixed and announced beforehand," Pet. 18 (*citing* Note, *Rediscovering the Contract Clause*, 97 Harv. L. Rev. 1414, 1427 (1984)), overrides the expressed health and safety demands of its citizens. This Court long ago determined that the Contracts Clause "is not to be read with literal exactness like a mathematical formula." *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 428 (1934). "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Id.* at 435.

In this light, and contrary to petitioners' complaint that "it will often be difficult to identify whether the State is acting in whole or in part to further its financial interests distinct from some other form of self-interest," Pet. 18, any rule beyond the financial self-interest rule of *United States Trust* would prove unworkable: by definition, anything within a state's police power "authority to safeguard the vital interests of its people," *Blaisdell*, 290 U.S. at 434, could be considered "some other form of self-interest." Petitioners offer no principled limit to their proposed rule invalidating the application of any law that impairs any contract with the state regardless of financial benefit, for there is none. Instead, attempted enforcement of such a sweeping and unwarranted intrusion into state action would soon evince the wisdom of Justice Holmes in his observation that "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 05-588

IN THE

Supreme Court of the United States

SEVEN UP PETE VENTURE, *ET AL.*,

Petitioners,

v.

THE STATE OF MONTANA, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Montana

BRIEF IN OPPOSITION OF RESPONDENTS MONTANA ENVIRONMENTAL INFORMATION CENTER, MONTANANS FOR COMMON SENSE MINING LAWS-FOR-I-137, BIG BLACKFOOT CHAPTER OF TROUT UNLIMITED, AND MINERAL POLICY CENTER

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January 2006

QUESTION PRESENTED

Whether this Court should review the Montana Supreme Court's rejection of petitioners' fact-bound claims that a prohibition on environmentally destructive mining techniques constituted a taking or a Contract Clause violation under Montana law.

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INTRODUCTION

Petitioners in this case seek review of the Montana Supreme Court's rejection of their state-law challenges to the loss of state mineral leases on which they hoped to conduct environmentally destructive cyanide heap-leach gold mining on the banks of a pristine trout stream. Although petitioners contend that the Montana Supreme Court decided federal takings and Contract Clause questions in the course of deciding their strictly state-law claims, they fail to mention that the Montana Supreme Court also affirmed the termination of their mineral leases on the purely state-law ground that a state agency had correctly determined that they had violated a term of the leases by failing to take active steps to pursue the permitting process over a seventeen-month period. That purely state-law ruling constitutes an independent and adequate state-law ground for the judgment below.

In any event, petitioners' takings and Contract Clause claims do not warrant review. Even assuming that the state court decided a federal takings claim, petitioners' principal criticism of the state court is that it analyzed their takings claim in the way they asked it to (as a claim that they had been deprived of the *opportunity* to apply for a permit). Petitioners' additional assertion that the Montana court's takings analysis presents a conflict with federal appellate decisions is groundless, amounting to little more than a claim that the Montana court cited a decision that cited other decisions that reflected different approaches to an issue not presented here.

As for petitioners' Contract Clause claim, the Montana court decided only a state Contract Clause claim over which this Court has no jurisdiction. In any event, petitioners' argument that the court should have applied heightened scrutiny even though the alleged contractual impairment did not advance the state's pecuniary interest is contrary to this Court's decision in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), and is not supported by any judicial authority. Petitioners concede that the only other decisions they

know of that address the issue *support* the Montana court's approach. Under such circumstances, there would be no reason to review the Montana court's analysis even if it concerned a federal Contract Clause issue.

STATEMENT

In November 1998, Montana voters enacted Initiative 137 (I-137) to ban new cyanide heap-leach mines. Cyanide heap-leach mining is a relatively recent invention. Mine operators pour a cyanide solution over tremendous piles of low-grade ore extracted from open-pit mines, leaching minuscule amounts of gold and silver from each ton of ore. The inevitable by-products are residual cyanide and huge quantities of waste rock, which are prone to further leaching of acidic compounds from exposure to air and precipitation. Waste water from heap-leach piles produces acid mine drainage that can persist for decades, degrading surface and subsurface waters. All parties agree that cyanide heap-leach mines can cause serious environmental damage.

Bankrupt open-pit cyanide heap-leach mines have caused serious environmental problems in Montana. *See, e.g.*, 67 Fed. Reg. 7191 (Feb. 15, 2002) (final environmental impact statement addressing reclamation/treatment alternatives for acid mine drainage at Zortman mine). *See also Gros Ventre Tribe v. United States*, 2004 Lexis 26865 (D. Mont. June 29, 2004) ("It is undisputed that the Zortman-Landusky mines have devastated portions of the Little Rockies, and will have effects on the surrounding area, including the Fort Belknap Reservation, for generations. That devastation, and the resulting impact on tribal culture, cannot be overstated."). Montana taxpayers have been left to bear the cost of reclaiming and treating abandoned cyanide heap-leach mines. *See* 67 Fed. Reg. 7191 (discussing the preferred reclamation alternative at Zortman, which exceeded bonding by $22.5 million, and noting the need for an additional $11 million for permanent water treatment regardless of the alternative selected).

Twelve years before I-137, Montana issued mining leases on several sections of state land to Western Energy Company. The properties, which contained large quantities of low-grade gold and silver ore, were close to the Blackfoot River, the stunning trout stream immortalized in Norman Maclean's *A River Runs Through It*. Petitioner Seven-Up Pete Joint Venture (the Venture) purchased the leases from Western Energy, and, along with several other of the petitioners, acquired additional private mineral leases on adjacent land and began planning a massive cyanide heap-leach mine on the banks of the Blackfoot.

The leases themselves granted the Venture no right to mine on state lands; Montana law required the operator to obtain a Metal Mine Reclamation Act operating permit, as well as all other permits required by state and federal agencies. Mont. Code Ann. § 82-4-335(1). Montana retained full authority to require the Venture to provide reclamation plans, environmental studies and other permits, to reject any part of the Venture's application as inadequate, and to deny an operating permit. *See* Mont. Admin. R. 17.24.404. Moreover, Paragraph 7 of the leases specifically stated that the lessee "shall fully comply with all applicable state and federal laws, rules and regulations, including but not limited to those concerning safety, environmental protection and reclamation."

In 1993, the Venture formally proposed its cyanide heap-leach mine adjacent to the Blackfoot, where it hoped to extract up to 9 million ounces of gold and 20 million ounces of silver on a portion of the leases known as the McDonald Project. Because of the necessity of completing an environmental impact statement (EIS) and the then-imminent expiration of the ten-year lease terms, Montana and the Venture entered into an amendment to the leases that tolled the remaining seventeen months of their terms, on the express condition that the Venture would actively pursue an operating permit. All other lease terms, including Paragraph 7, remained in full force and effect.

Aware of the environmental damage and taxpayer liability occasioned by the Zortman cyanide heap-leach mine and other failed cyanide mines in Montana, the respondent organizations that join in this brief formed a ballot-initiative committee, began a state-wide campaign to ban future open-pit cyanide heap-leach mining, and obtained the requisite signatures to put I-137 on the November 1998 ballot.[1] On July 2, 1998, while the campaign for I-137 was in full swing, the Montana Department of Environmental Quality (DEQ) issued a stop-work order on the McDonald Project EIS because of the Venture's failure to pay fees for third-party EIS services. The Venture missed later payments as well, and Montana notified the Venture in September 1998 that, because of the stop-work order on the EIS, the lease extensions granted to the Venture in 1993 were suspended, and the remaining unexpired primary lease term of seventeen months would begin to run for each of the mineral leases. Montana informed the Venture that the mineral leases would therefore terminate on their own accord on February 23, 2000, unless the Venture reactivated the permitting process.

I-137 was passed by a majority of Montana voters and became effective on November 3, 1998. The Venture did not possess an operating permit for a cyanide heap-leach mine when I-137 became law, but it still held its leases, which were actively running. The Venture, however, failed to complete the EIS and did not actively pursue completion of the operating permit application process. On February 24, 2000, Montana informed the Venture that its mineral leases for the McDonald Project had expired because of its failure to complete the application process, commence mining, return any royalties to the state, or otherwise comply with lease terms.

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[1] As intervenors in the courts below (*see* Pet. ii), the organizations are respondents in this Court under S. Ct. R. 12.6.

The Venture administratively appealed the termination of the leases, and on October 26, 2000, the Director of Montana's Department of Natural Resources and Conservation (DNRC) rejected the appeal on the ground that petitioners had done nothing to pursue the permitting process during the seventeen months between September 1998, when they were notified that the remaining terms of the leases would resume running, and February 2000, when the leases terminated.

Meanwhile, in April 2000, petitioners initiated this lawsuit in Montana state court, asserting a laundry list of state-law challenges to the cyanide heap-leach mining ban. Petitioners specifically refrained from presenting federal constitutional challenges in the state-court action, reserving them for a federal lawsuit that was filed simultaneously with the state case and stayed to allow exhaustion of state-law issues. After the final DNRC ruling upholding the termination of the mineral leases, petitioners expanded the state-law action to include a request for judicial review of that ruling as well.

When the trial court rejected all their state-law claims, petitioners appealed to the Supreme Court of Montana. The appeal presented only petitioners' (state) constitutional takings and impairment-of-contracts claims, as well as the claim that the trial court had erred in upholding the DNRC's lease termination decision. Petitioners' takings claim centered on the alleged taking of rights conferred by the state mineral leases (*see* Appellants' Initial Br. 11-30; Appellants' Reply Br. 3-13).[2] Specifically, petitioners contended that the leases gave them a property interest in "the *opportunity* for a favorable ruling on [the Venture's] application to conduct [cyanide heap-leach] mining," which they claimed had been taken by the state. Appellants' Reply Br. 3. Petitioners' only claim with respect to the alleged taking of property interests other

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[2] Petitioners' briefs in the Montana Supreme Court are available online at www.lawlibrary.state.mt.us/dscgi/ds.py/View/Collection-11541 (last visited January 4, 2006).

than the state mineral leases (i.e., private mineral leases or fee ownership of land and minerals) was their briefly stated contention that a remand was required under state law because the trial court had completely failed to articulate a reason for rejecting claims based on such property interests. *See* Appellants' Initial Br. 42-43; Appellants' Reply Br. 18-19.

The Montana Supreme Court rejected the takings and impairment-of-contract claims as well as the challenge to the DNRC's termination of the leases. *Seven Up Pete Venture v. State*, 114 P.3d 1009 (Mt. 2005). With respect to the takings claim, the court held that the interest petitioners claimed was taken—the opportunity to obtain a permit that they contended the mineral leases embodied—did not rise to the level of a constitutionally protected property interest because of the state's extremely broad discretion (entirely apart from the newly enacted ban on cyanide heap-leach mining) to deny or condition a permit. *Id.* at 1018-19. As for petitioners' fallback claim that the case should be remanded because the trial court had not articulated a reason for rejecting takings claims based on interests other than the state mineral leases, the court pointed out that the district court had indeed stated reasons for its decision in that respect. Because the petitioners' only claim was that the court had failed altogether to state reasons, the court did not evaluate any claims with respect to the correctness of the reasons stated. *Id.* at 1020.

The court went on to reject the contract-impairment claim on the ground that the mining ban was "reasonably related to the legitimate and significant purpose of protecting the environment." *Id.* at 1025. The court declined to apply a "heightened level of scrutiny" in evaluating the reasonableness of the ban because any impairment of the mineral leases was actually contrary to the state's pecuniary self-interest as a party to the contracts. *Id.* at 1023.

Finally, the court held that the DNRC had properly terminated the state mineral leases because petitioners had failed to take active steps to pursue the permitting process (a

failure that began *before* the passage of the cyanide heap-leach mining ban). *Id.* at 1025-27. Applying principles of Montana law, the court found that the DNRC's decision was not clearly erroneous because it was supported by substantial evidence in the record. The court canvassed a number of steps petitioners could have taken (notwithstanding the passage of the ban) to pursue the permit process, and it noted that petitioners themselves conceded that they "had to do 'something' to pursue issuance of the permits." *Id.* at 1026. The court concluded that petitioners' filing of a challenge to the ban (*after* the leases had already terminated) while doing nothing else to advance the permitting process was not enough. *Id.* Thus, for reasons that in no way rested on either the passage of the mining ban or its constitutionality, the court upheld the state's termination of the mineral leases.

REASONS FOR DENYING THE WRIT

I. The Montana Supreme Court's Takings and Contract Clause Rulings Are Not Outcome Determinative.

Even while asserting their takings and Contract Clause claims concerning initiative I-137, petitioners nowhere address the actual basis on which their leases were terminated: the Montana DNRC's determination that they had failed actively to take available steps to pursue the permitting process. The Supreme Court of Montana affirmed the agency's determination, holding that:

> [I]t is clear that the Venture was not limited to simply bringing a legal challenge to I-137 while doing nothing before the agency. We cannot conclude, therefore, that the DNRC and District Court's conclusion of law that the Venture failed to actively pursue the permitting process before the agency was erroneous.

114 P.3d at 1027.

The Montana Supreme Court's ruling in this respect was based entirely on its analysis of the administrative record and

Montana administrative law, and in no way turned on the constitutional validity of the cyanide heap-leach mining ban. Thus, as a matter of law, the reason petitioners lost their state mineral leases was their abandonment of the lease permitting process, not the passage or application of the cyanide mining ban. In light of the Montana courts' state-law based holding that the leases were properly terminated because of petitioners' failure to take required steps in the permitting process, the question whether the application of the mining ban to those leases would constitute a taking or a Contract Clause violation if the leases were otherwise still valid is a purely abstract and theoretical one, with no effect on whether petitioners were unlawfully deprived of property when they lost the leases.

Nothing in the Montana court's discussion of the lease termination issue refers to any principles of federal law, let alone federal constitutional law. Thus, the holding that the agency properly found that the leases could be terminated is an "independent" state-law ground of decision, in the sense that it is not "interwoven with the federal law" within the meaning of *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). *See also California v. Freeman*, 488 U.S. 1311, 1314-15 (1989) (O'Connor, J., in chambers) (noting that where a state court's discussion of federal constitutional principles was "strictly confined" to a section of its opinion that was separate from the section that resolved a state-law issue, the state-law ruling was independent of federal law).

The state-law lease termination ruling is also "adequate" to support the judgment of the Montana Supreme Court because it depends neither on the existence nor the constitutionality of the heap-leach mining ban, and thus renders irrelevant whether the ban would otherwise constitute a taking or impairment of the mineral leases. Such a state-law ground for a state court ruling bars review by this Court, even if the state court has also addressed issues of federal law that are not essential to support its judgment:

> This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. ... In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory. *See Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion").

Coleman v. Thompson, 501 U.S. 722, 729 (1991).

Here, any discussion of whether the mining ban *would have* constituted a taking of petitioners' mineral leases, or *would have* unlawfully impaired them under the Contract Clause, would be an advisory opinion, because those leases were properly terminated under state law for reasons independent of the existence or constitutionality of the mining ban. The Court therefore lacks jurisdiction over the petitioners' constitutional claims concerning the impact of the mining ban on the leases. Moreover, even if the Montana court's lease termination holding somehow fell short of the requirements of the independent and adequate state ground doctrine, the existence of this additional holding below, coupled with petitioners' failure either to challenge it or explain how it would not result in the same result regardless of this Court's ruling on the constitutional questions they present, would still weigh heavily against discretionary review of this case.

II. Petitioners Present No Compelling Basis for Review of the Montana Supreme Court's Takings Analysis.

Petitioners acknowledge that they raised no federal constitutional claims before the Supreme Court of Montana, and that court's discussion of petitioners' takings claim contains no statement that it is deciding an issue of federal law. In this respect, the case is unlike *Michigan v. Long* and most of this Court's recent decisions addressing the independent and adequate state ground doctrine, where state courts expressly stated that they were deciding both state and federal constitutional questions, and the issue was whether the state-law holding was independent of the court's interpretation of federal law. *See Long*, 463 U.S. at 1037 n.3; *see generally* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* ch. 3.24 at 202-07 (8th ed. 2002). Assuming for the sake of argument, however, that the Montana court's opinion should be read as deciding a federal takings claim because of its citation of federal takings case law, *cf. New York v. Class*, 475 U.S. 106 (1986), petitioners' arguments that this Court should review the Montana court's rejection of their takings claim remain unpersuasive.

Petitioners chide the Montana Supreme Court for focusing on their arguments concerning the state mineral leases and "ignoring" any takings claim based on such "traditional property interests" as "privately-owned real property (fee interests in surface estates)" and "separate ownership of underlying minerals." Pet. 8. But when a state court *ignores* a federal claim that a litigant has *expressly declined to raise*, there is no federal issue for this Court to review under even the most expansive readings of such decisions as *Michigan v. Long* and *New York v. Class*. This Court may have jurisdiction to entertain any federal issues *actually resolved* by the Montana Supreme Court even though petitioners never raised such issues (*see* Pet. 6, n.1), but it will not address federal

issues that were neither raised nor decided in that court. *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997).[3]

In any event, the reason the state court focused its takings analysis on whether petitioners had a property interest in the opportunity to apply for a mining permit to work their state mineral leases was that *that was the takings question petitioners asked it to decide*. The state court's opinion clearly reflects the court's understanding that the opportunity to apply for a permit was the interest that the petitioners claimed was taken. *See* 114 P.3d at 1016 ("The Venture emphasizes that it is not contending that it had a vested right to mine with cyanide, but that it had a property right in 'the opportunity for a favorable ruling on its mining permit application' which existed prior to the passage of I-137."). Petitioners' briefs in the state court bear out the court's understanding that petitioners' argument was that "the property interest actually taken by I-137" was "the *opportunity* for a favorable ruling on its application to conduct that type of mining." Appellants' Reply Br. 3; *see also* Appellants' Initial Br. 20-23. The Montana court rejected petitioners' argument because its analysis of the applicable regulatory scheme even *before* passage of the cyanide mining ban demonstrated that the state had such wide discretion to deny a permit that the mere opportunity to apply for a permit did not rise to the level of a property interest protected against a taking under Montana's constitution. 114 P.3d at 1017-19.

Petitioners make no effort to demonstrate that the Montana's court's analysis of the regulatory framework that de-

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[3] As noted above, the issue petitioners *did* raise on appeal about property interests other than the state mineral leases (such as fee interests and private mineral leases) was that a remand was required under principles of Montana state law because the trial court had failed to explain its reasons for rejecting claims based on those interests. The Montana Supreme Court held that this state-law procedural argument failed because the trial court had stated reasons for its holding. 114 P.3d at 1020.

fined their "opportunity" to obtain a permit was erroneous, and even if they did, the correctness of such a fact-bound ruling is not an issue meriting exercise of this Court's certiorari jurisdiction. Petitioners instead argue that the state court erred by not defining their claimed property interest differently from the way they defined it in their own briefs to that court. Even if their arguments had merit, this Court does not sit to correct errors by state courts, especially not when the claimed errors resulted from the petitioners' own failure clearly to present the arguments they now advance.

Recognizing that a mere claim of error is not enough, petitioners also attempt to argue that the Montana court's analysis conflicts with that of federal appellate courts, but the conflicts they allege are illusory.

First, petitioners claim that the Montana Supreme Court's opinion "mistakenly cited case law that reveals conflicts among federal appeals courts." Pet. 11. Specifically, petitioners point out that the opinion below cites a prior Montana decision, *Kiely Construction, L.L.C. v. City of Red Lodge*, 57 P.3d 836 (Mt. 2002), which in turn cited "several federal appellate cases." Pet. 11. Those cases, according to an opinion of the D.C. Circuit, *George Washington University v. District of Columbia*, 318 F.3d 203 (D.C. Cir. 2003), take a "different approac[h]" from a decision of the Third Circuit, *DeBlasio v. Zoning Board*, 53 F.3d 592 (3d Cir. 1995).

The "different approaches" referred to by the D.C. Circuit in *George Washington University* relate to the issue of how to characterize a plaintiff's claimed property interest in a *substantive due process* challenge to zoning regulations—an issue not presented here. Thus, petitioners' claim of a conflict boils down to the assertion that the Montana court cited a case that cites other cases that (arguably) take "different approaches" to an issue not presented here. That is hardly the type of conflict that this Court exercises its certiorari jurisdiction to resolve. *See* S. Ct. R. 10(b) (Court will consider exercising jurisdiction when "a state court of last resort has de-

cided an important federal question in a way that conflicts with the decision ... of a United States court of appeals").

Second, on a less ethereal level, petitioners argue that the decision below conflicts with the Federal Circuit's decision in *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990). *United Nuclear*, however, differs from this case in a number of critical respects. The issue in *United Nuclear* was superficially similar to the issue here: whether United Nuclear's mineral leases on an Indian reservation were taken when the Secretary of the Interior denied it a permit to conduct uranium mining operations. The reason for the permit denial was that the Indian tribe (which had originally agreed to the leases) would not agree to allow mining unless the company made additional payments not called for by the leases. However, the leases provided that United Nuclear was only required to obtain the *Secretary*'s approval and to comply with regulations officially promulgated by the Secretary. It was undisputed that United Nuclear complied with all regulatory requirements for approval of its mining operations by the Secretary, and that *tribal* approval had never previously been required by the Secretary and was still not required by any applicable regulations. Under those circumstances, the court held that the denial of a permit for reasons that United Nuclear could not have contemplated when it entered into the leases was an interference with its legitimate, investment-backed expectations significant enough to constitute a regulatory taking.

Here, by contrast, the court found that even absent the cyanide mining ban, the state could have denied a permit for any number of reasons, rendering any expectation of obtaining a permit much more speculative than in *United Nuclear*. In addition, the mineral leases in this case provided that they would be subject to any and all applicable state environmental protection laws and regulations. The cyanide mining ban is such a law, unlike the extra-legal requirement of tribal approval at issue in *United Nuclear*.

Perhaps most importantly, in light of petitioners' criticism of the Montana court's characterization of the alleged property interest at issue in this case as being only the opportunity to seek a permit to exploit the mineral leases (rather than the leases themselves), the court in *United Nuclear* characterized the interest at issue there in precisely the same way: the property taken was "'not the leases,' but United Nuclear's 'expectation that it would be permitted by defendant to engage in mining the leased tract.'" 912 F.2d at 1436. The difference between the two cases is thus not their basic analytic approach; rather, it is that the plaintiff's expectations were reasonable enough to constitute a protected property interest on the particular facts in *United Nuclear*, while petitioners' expectations were not similarly well-grounded on the facts of this case.

Finally, petitioners argue that the Court's recent decision in *San Remo Hotel v. City & County of San Francisco*, 125 S. Ct. 2491 (2005), renders their challenge to the Montana court's holding somehow more worthy of review here than it would have been before *San Remo*. *San Remo* may well be fatal to petitioners' effort to split their cause of action and reserve federal constitutional claims for later litigation in federal court. But *San Remo*'s holding that conventional claim and issue preclusion principles apply in takings litigation does not transform claims otherwise unsuitable for this Court's review into certworthy issues. That petitioners may have no opportunity to present meritless claims to a federal court later does not mean this Court should hear them now.

III. Petitioners' Challenge to the Montana Supreme Court's Application of the Montana Constitution's Contract Clause Does Not Merit Reivew.

The Montana Supreme Court held that the cyanide heap-leach mining ban did not violate Montana's constitutional prohibition on impairment of contracts because it served significant and legitimate state interests, and its adjustment of contractual rights was a reasonable means of promoting those

interests. 114 P.3d at 1023-24. Reviewing the evidence in the record concerning the environmental impact of cyanide heap-leach mining, the court concluded:

> In consideration of the acknowledged risks associated with the use of cyanide heap leaching, and the expressed concerns about the inadequacy of existing laws, we conclude that the State could legitimately determine that this method of mining required strict regulation, and that I-137 was reasonably related to that legitimate purpose.

Id. at 1024.

This Court lacks jurisdiction to review the Montana court's state constitutional law ruling. *Murdock v. Memphis*, 87 U.S. 590 (1874). Petitioners' assertion that, under *New York v. Class*, 475 U.S. at 109, the Montana court's Contract Clause decision rests on federal constitutional grounds is erroneous. Unlike the state court decision in *Class*, which mentioned the state constitution only once and relied interchangeably on federal and state case law *(see id.)*, the Montana court's impairment-of-contract analysis relied principally on state-court decisions construing Montana's own Contract Clause, and it cited federal decisions mostly in passing or in footnotes. *See* 114 P.3d at 1020-24. Thus, the Montana court's decision here does not "fairly appea[r] to rest primarily on federal law, or to be interwoven with the federal law." *Michigan v. Long*, 463 U.S. at 1040. Although the court noted that Montana's Contract Clause is "simila[r]" to the Contract Clause of the U.S. Constitution, *id.* at 1020, nowhere did the court indicate (as did the Michigan Supreme Court in *Michigan v. Long*) that it was issuing a holding on a federal as well as a state constitutional challenge. *See Long*, 463 U.S. at 1037 n.3. Moreover, in this case the Montana Supreme Court, unlike the Michigan court in *Long* and the New York court in *Class*, "ma[de] clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves

compel the result that the court has reached." *Long*, 463 U.S. at 1041; *see* 114 P.3d at 1021 n.16 (stating that court relies on federal Contract Clause precedents for "guidance regarding our Contracts Clause analysis").

Even if the Montana court's opinion could be construed as deciding a federal Contract Clause issue, review would plainly be unwarranted. The state-law standard applied by the Montana court is completely consistent with the federal constitutional standard set forth by this Court in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410-13 (1983), and petitioners do not contest that, under that standard, the Montana law at issue reasonably serves significant and legitimate state interests.

Instead, petitioners argue that the Montana court should have applied "heightened scrutiny" to the statute under this Court's ruling in *United States Trust Co. v. New Jersey*, 431 U.S. 1, because the state was a party to the contracts at issue—that is, the state mineral leases. But *United States Trust* holds only that heightened scrutiny applies when a state impairs its "*own financial obligations*." *Id.* at 25 (emphasis added). The reason for that holding, this Court explained, was that "[a] governmental entity can always find a use for extra money," and thus "[i]f a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Claus would provide no protection at all." *Id.* at 26.

As the Montana court correctly noted (in rejecting application of heightened scrutiny under the state's own Contract Clause), these considerations are wholly inapplicable to a law that is not targeted at state financial obligations at all, and that in fact has an *adverse* effect on the state's pecuniary interests. As the court explained (*id.* at 1023):

> [T]he record reveals that the application of I-137—created and passed by the voters of Montana—did not act to benefit the State's self-interest. The passage of I-137 caused the State to forego the opportunity to re-

> ceive royalty payments estimated at $5 million annually over the production life of mining operation[s], which was expected to be twelve years. Thus, though the State was a party to the contract, its interests as a contracting entity were actually diminished by I-137's passage, and thus, for purposes of a Contracts Clause analysis, it is not necessary to apply a heightened level of scrutiny to the Initiative.

Petitioners contend that whether *U.S. Trust*'s heightened scrutiny is limited to impairment of contracts that serve a state's pecuniary interests is a question that merits this Court's attention, but they concede that they have been able to locate only two federal decisions that address the issue, both of which "have held, like the Montana Supreme Court, that the need for heightened scrutiny under *United States Trust* is limited to cases in which a State is seeking to further its 'financial' or 'pecuniary' self-interest." Pet. 18 (citing *Mercado-Boneta v. Administracion del Fondo de Compensacion*, 125 F.3d 9, 16 (1st Cir. 1997); *Linton v. Commissioner*, 65 F.3d 508, 519 (6th Cir. 1995). Given the acknowledged agreement of the courts in the very small number of cases in which the issue has arisen, the exercise of this Court's certiorari jurisdiction is hardly necessary. Should a conflict arise over the issue—in a case that presents it as a matter of federal rather than state constitutional law—there will be ample opportunity for this Court to resolve it then.

In any event, petitioners' arguments for their position on the merits are extremely weak. Petitioners assert that the need for heightened scrutiny reflects not only concern over the state's self-interest, but also the need "to maintain the credit of public debtors." Pet. 17 (citing *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 472 n. 24 (1985)). That is simply a non sequitur: The interest in maintaining the credit of public debtors is implicated when (as in *U.S. Trust*) a state seeks to excuse itself from its *financial obligations*. That interest in no way suggests a need for

heightened scrutiny of generally applicable environmental regulations that do not involve efforts by the state to avoid obligations to creditors.

Petitioners further rely on a portion of what they describe as the plurality opinion in *United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996), stating that "when we speak of governmental 'self-interest,' we simply mean to identify instances in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties."[4] The statement petitioners cite, however, did not involve the Contract Clause, let alone the issue of heightened scrutiny under *U.S. Trust*; rather, it concerned the applicability of the "sovereign acts doctrine" to a breach of contract claim against the United States, a different matter altogether.[5] Petitioners' out-of-context quotation from *Winstar* does nothing to advance their assertion that the heightened scrutiny issue merits review by this Court.

Beyond their misplaced reliance on *Winstar*, petitioners offer nothing but generalizations quoted from a handful of law review notes and treatises. Suffice it to say that these sources hardly constitute an important reason for this Court to consider petitioners' request that it expand the scope of heightened scrutiny under *U.S. Trust* to cases where a state is not abrogating contracts for its own pecuniary benefit.

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[4] The cited passage of *Winstar* was not in fact the plurality opinion. Unlike the rest of Justice Souter's opinion, which reflected the views of four Justices, the passage on which petitioners rely carried only three votes: those of Justices Souter, Stevens, and Breyer.

[5] Moreover, even if the "sovereign acts" doctrine could somehow be correlated with the circumstances under which *U.S. Trust* would call for heightened scrutiny under the Contract Clause, it appears that the three Justices who joined the cited portion of *Winstar* would recognize that Montana's cyanide heap-leach mining ban, unlike the statute in *Winstar*, qualifies as a "public and general" law because it applies equally to public and private contracts and was not specifically aimed at abrogating state contractual obligations. *See Winstar*, 518 U.S. at 896-903.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Date: January 2006

No. 05-588

IN THE

Supreme Court of the United States

SEVEN UP PETE VENTURE, an Arizona General Partnership, d/b/a SEVEN UP PETE JOINT VENTURE, CANYON RESOURCES CORPORATION, a Delaware Corporation, JEAN MUIR, DR. IRENE HUNTER, DAVID MUIR, ALICE CANFIELD, TONY PALAORO, JUNE E. ROTHE-BARNESON, AMAZON MINING COMPANY, a Montana Partnership, PAUL ANTONIOLI, STEPHEN ANTONIOLI, and JAMES E. HOSKINS,

Petitioners,

v.

THE STATE OF MONTANA,

Respondent.

On Petition for Writ of Certiorari to the Montana Supreme Court

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY STATEMENT

The responses of the State of Montana ("State") and the intervenor groups ("Intervenors") only underscore the need for this Court's review. This case should have been a straightforward one. But, to avoid exposing the State to a large potential liability, the Montana Supreme Court eschewed a straightforward analysis of this Court's Takings and Contracts Clause precedents. The Montana court's analysis contradicts this Court's clear teachings, mistakenly infuses a conflicting line of federal appeals courts decisions, and directly conflicts with *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990).

The key facts are undisputed. Petitioners owned various types of property within Montana: state mineral leases, private leases, and realty interests. Pet. App. 4a-5a ¶ 8. Those properties once were worth hundreds of millions of dollars because there was an economically viable means of extracting the underlying gold and silver deposits. An unforeseeable initiative law (I-137) rendered these properties worthless by eliminating the prior opportunity for the state agency to exercise its discretion to grant mining permits to Petitioners. The Montana Supreme Court denied that there had been a "total regulatory taking" under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030-32 (1992), holding that Petitioners never had any "property" interest. That holding is at odds not only with cases decided by this Court and federal appeals courts but also with the recognition later in the court's opinion that I-137 substantially impaired Petitioners' state contracts (themselves a type of constitutionally protected property). The court then compounded its constitutional error by declining to apply heightened Contracts Clause scrutiny to the State's impairment of its own contracts.

REPLY ARGUMENT

I. THE ISSUE OF WHETHER PETITIONERS HAD "PROPERTY" PROTECTED FROM UNCOMPENSATED TAKINGS WARRANTS THIS COURT'S REVIEW.

Respondents, by continuing to obfuscate the relevant property interests, highlight the confusion and errors infecting the Montana Supreme Court's holding that Petitioners had no constitutionally protected property. That holding contradicts this Court's cases, relies on an inapposite line of divided federal appeals court decisions, and conflicts with an indistinguishable Federal Circuit decision.

A. This Case Squarely Raises The Issue Whether Leases And Real Estate Providing An Opportunity For Productive Economic Use Are Constitutionally Protected Property.

The petition demonstrated that Petitioners' leases and real estate are constitutionally protected "property." Pet. 8 (citing cases). What gave this property value was the opportunity to seek permission to recover the underlying gold and silver deposits in an economically viable manner. That opportunity, which existed before but not after I-137, not only made Petitioners' leases and real estate valuable but was itself a property interest. *See* Pet. 9 (citing cases).[1]

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[1] Contrary to the State's mischaracterization, Petitioners are not claiming nor are they required to show that they had "a vested right to mine using the cyanide heap-leaching process" (State Resp. 8). What Petitioners once had and what I-137 eliminated was the opportunity for the State to exercise independent discretion to decide whether or not Petitioners' proposed mining projects satisfied the preexisting permit standards. I-137 took away that opportunity (which itself was a property interest) and thereby rendered worthless Petitioners' previously valuable land and leases. By so doing, I-137 caused a total regulatory taking.

Respondents defend the Montana Supreme Court's holding by ignoring Petitioners' leases and real estate that were rendered worthless by I-137. Thus, the State distorts Petitioners' claim by writing that "Petitioners acknowledge that the property at issue is neither land nor leases, but 'an opportunity for mining permits' on the land under the leases." State Resp. 8. Contrary to the State's attempt to redefine the case, Petitioners unambiguously stated the question presented as: "Whether real property interests and State Mineral Leases, which carried with them an opportunity to seek a mining permit, are 'property' protected under the Takings Clause." Pet. i.

The property interests identified in the Petition are precisely those Petitioners identified in the state courts. The Montana Supreme Court recognized that Petitioners' holdings included leases as well as realty – all of which were "affected by I-137." Pet. App. 4a-5a ¶ 8. Petitioners alleged that I-137 caused a total regulatory taking by precluding the only economically beneficial use of these properties. *See* Pet. App. 67a, 85a-88a. Petitioners reiterated on appeal that their property consisted of state and private leases as well as "fee ownership of real property (including ownership of both surface and mineral estates)." Appellants' Br. 1-2, 11-12, 41-42. Indeed, they argued that the district court had erred by not addressing these other property interests. *See* Pet. App. 19a-20a ¶¶ 36-37. The State responded that "[t]he same reasoning and analysis" applies to all interests. Appellee Br. 33-35. The Montana Supreme Court held that Petitioners had no protected property because there was no assurance of permits. Pet. App. 18a-19a ¶¶ 32-34.

Respondents next suggest that Petitioners lost their state leases for reasons independent of I-137 (State Resp. 9-10) and that the Montana Supreme Court therefore issued an "advisory opinion" on the takings claim (Intervenors' Resp. 9). These suggestions are baseless. The Montana Supreme

Court "do[es] not issue advisory opinions." *Bitterroot River Protective Ass'n v. Siebel*, 326 Mont. 241, 246, 108 P.3d 518, 521 (2005) (citing cases). That court did and had to address the merits of the takings claims because I-137 indisputably rendered the state leases (not to mention Petitioners' other holdings) worthless.[2]

B. The Montana Supreme Court's Holding That There Was No Constitutionally Protected Property Contradicts This Court's Teachings.

The petition demonstrated that a new state law categorically precluding the only economically viable use of property (here, leases and realty) would constitute a total regulatory taking under this Court's case law. *See* Pet. 9 (quoting holding in *Lucas*, 505 U.S. at 1015, that a "statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use of his land"). Indeed, the present case is controlled by the "watershed decision" (*Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2081 (2005)) in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Justice Holmes' opinion for the Court in *Mahon* held that a state law "mak[ing] it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414-15.

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[2] Respondents seek to blur this point by injecting the separate issue of whether the leases should have been administratively extended pending judicial review. While the court held that the agency had no obligation to extend the state leases past 2000 (Pet. App. 32a-36a ¶¶ 56-65), there was no dispute that the 1998 enactment of I-137 rendered those leases worthless. By the time the leases expired in 2000, Petitioners had paid all past due administrative fees in order to preclude any argument that they lost the leases for reasons other than I-137. *See* Pet. App. 34a ¶ 61. The failure to complete other administrative steps, such as "obtain[ing] a final permit" or "propos[ing] an alternate legal method of gold recovery" (*id.* ¶ 62), was the direct result of I-137 outlawing the only economically viable mining method.

The State responds that "[t]here can be no compensable taking 'if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.'" State Resp. 8 (quoting *Lucas*, 505 U.S. at 1027). That does not help the State because, as the Montana Supreme Court recognized, the newly-proscribed use here "has always been legal in Montana" (Pet. App. 25a ¶ 44). Intervenors' lengthy discussion of the alleged safety risks associated with this type of mining (Intervenors' Resp. 2-4) ignores the Montana Supreme Court's further recognition that "cyanide heap leaching has been shown to be safer than other methods" of mining. Pet. App. 27a ¶ 48.[3]

The key point under *Lucas*, regardless of whether cyanide heap leach mining is dangerous or actually "safer than other methods" (Pet. App. 27a ¶ 48), is that it indisputably was lawful before I-137. Indeed, this mining method remains lawful in Montana even today for mines operating before 1998. Pet. App. 7a ¶ 14. Thus, the State cannot show that the "use of [Petitioners'] properties for what are now expressly prohibited purposes was *always* unlawful" (*Lucas*, 505 U.S. at 1030, emphasis in original).

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[3] Intervenors make other incorrect factual claims. For example, they erroneously claim that "[c]yanide heap leach mining is a relatively recent invention." Intervenors' Resp. 2. In fact, "[s]urface mining of gold-bearing ores, combined with cyanide leaching of the ore to recover the gold, has been a lawful, highly productive activity in the State of Montana, from approximately 1900 until the passage of Initiative 137 in November, 1998." Pet. Am. Compl. p. 6, ¶ 29; *see also* Pet. App. 44a-45a (district court's citation of this same complaint paragraph for point that "since at least 1970, the use of cyanide with respect to the processing of ores has been subject to various regulations in the state of Montana"). Intervenors' claim is also at odds with the Montana Supreme Court as to an historical fact well known to those state justices. That court, citing "Montana's long association with mining," wrote that "mining based upon cyanide heap leaching has always been legal in Montana, and, in fact, the country at large." Pet. App. 25a ¶ 44.

Respondents seek to shift the focus from whether Petitioners' holdings (which before 1-137 provided an opportunity for economically beneficial use) were property to whether mining permits themselves are property. The prior permit system, however, cannot excuse from the just compensation requirement a new categorical ban that ensures Petitioners' holdings will have no economically viable use. *See* Pet. 10 (discussing *Montana Ry. Co. v. Warren*, 137 U.S. 348 (1890), and other cases ignored by Respondents).

C. The Montana Supreme Court's Holding Also Conflicts With Federal Appellate Decisions.

1. The Court Cited Federal Appellate Cases That Conflict Regarding Whether The Constitutional Focus Should Be On A Permit Rather Than On The Existing Property.

The Montana Supreme Court expressly grounded its holding upon the reasoning of *Gardner v. City of Baltimore*, 969 F.2d 63, 68 (4th Cir. 1992). *See* Pet. App. 13a-14a ¶ 28 (citing *Gardner* and a prior Montana Supreme Court decision that also cited *Gardner*). The petition demonstrated that *Gardner* was one of a series of federal appellate decisions that conflict regarding whether and when the constitutional focus should be on the sought-after permit or the existing property. *See* Pet. 11-13 (citing and discussing cases).

Respondents do not dispute the existence of an intercircuit conflict worthy of this Court's ultimate review. Instead, they claim that the conflict "relate[s] to the issue of how to characterize a plaintiff's claimed property interest in a *substantive due process* challenge to zoning regulations – an issue not presented here." Intervenors' Resp.12 (emphasis in original); *see also* State Resp. 10. That distinction only confirms Petitioners' point that the Montana Supreme Court erred by extending a conflicting line of federal appellate

decisions to a takings case in which a new law categorically precluded any economically viable use of existing property. *See* Pet. 11-13. The Montana Supreme Court, however, saw the issue differently. It held that this case was controlled by the reasoning of *Gardner*, and thereby extended that line of conflicting federal cases. Respondents, who benefited from this extension of *Gardner*, should not now be allowed to avoid further review by denying that *Gardner* has any applicability.

2. The Decision Below Directly Conflicts With A Federal Circuit Decision In An Indistinguishable Mining Case.

The petition further showed (Pet. 12-13) that the holding directly conflicts with *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990). Respondents concede that *United Nuclear* is "superficially similar" to this case (Intervenors' Resp. 13), but then try to distinguish it on its facts. State Resp. 10-11. Respondents' proposed distinctions are illusory; under the holding of *United Nuclear*, Petitioners plainly had property interests protected from uncompensated regulatory takings. The present case warrants certiorari under this Court's Rule 10(b) because "a state court of last resort has decided an important question of last resort in a way that conflicts with the decision ... of a United States court of appeals."

The *United Nuclear* holding – that the relevant property interest was the mining company's "leasehold interest in the minerals" and "not the mere expectation that [it] would be permitted to engage in mining" (912 F.2d at 1437) – is directly contrary to the decision below. Respondents not only misstate that holding but turn it on its head, claiming the Federal Circuit "characterized the interest at issue there in precisely the same way [as the Montana court characterized the interest here]: the property taken was

'not the leases, but United Nuclear's 'expectation that it would be permitted by defendant to engage in mining the leased tract.'" Intervenors' Resp. 14 (quoting 912 F.2d at 1436). The quoted passage, however, was itself quoting the *Claims Court's* reasoning. *See* 912 F.2d at 1436 (passage quoted by Respondents beginning with "The Claims Court held, however, ..."). The Federal Circuit opinion overturning the Claims Court explained that its identification of the relevant interest was "[c]ontrary to the ruling of the Claims Court." *Id.* at 1437.

Respondents offer irrelevant factual distinctions, but the facts of this case are even more compelling than *United Nuclear*. The key in both cases is that the government unforeseeably changed the rules long after mining leases were signed. The change there was "a new policy requiring tribal approval of mining plans." 912 F.2d at 1436. The Federal Circuit found, just like the Montana Supreme Court here, that provisions making the leases subject to future regulations could not "fairly [] be said to have anticipated" this new policy. *Id. Compare* Pet. App. 25a ¶ 44 (similar finding in this case). The distinction between the permitting process changes – a tribal approval requirement in *United Nuclear* rather than an absolute ban here – makes this an even more compelling case for finding a categorical taking. And, the fact that Petitioners "invested more than $70 million" in the projects (Pet. App. 23a ¶ 42) as compared to the $5 million invested in *United Nuclear* (912 F.2d at 1436), only heightens Petitioners' "investment-backed expectations" (*Lingle*, 125 S. Ct. at 2081-82; *Lucas*, 505 U.S. at 1019 n.8).[4]

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[4] The State's argument that compensation is unnecessary because I-137 was meant to protect the environment, State Resp. 11 (citing *Mugler v. Kansas*, 123 U.S. 623 (1887); *Allied-General Nuclear Services v. United States*, 839 F.2d 1572 (Fed. Cir. 1988)), lacks force because I-137 eliminated all value of Petitioners' property by precluding a previously-lawful use. *See Lucas*, 505 U.S. at 1026-32 & n. 13 (distinguishing *Mugler*).

II. THE COURT'S REFUSAL TO APPLY HEIGHTENED SCRUTINY TO THE STATE'S IMPAIRMENT OF ITS OWN CONTRACTS WARRANTS FURTHER REVIEW.

This Court invariably has applied heightened Contract Clause scrutiny where a State impairs its own contracts. Pet. 15 (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977); *United States v. Winstar Corp.*, 518 U.S. 839, 876 (1996) (plurality opinion); and other cases). The Montana Supreme Court, in contrast, applied a deferential rather than heightened standard even though I-137 impaired the State's own contracts. Pet. App. 26a ¶ 45. This Court should consider whether there is justification for creating an exception to the heightened constitutional standard established by *United States Trust* and its progeny.

The State argues that the Montana court was correct to eschew the *United States Trust* standard because the "rationale" for heightened scrutiny applies only where a State's self-interest for impairing its own contract is financial in nature. Resp. 13-14. The State's attempt to distinguish between financial and other forms of self-interest ignores the *Winstar* plurality opinion rejecting such a distinction. *See* Pet. 17-18. A State will always be acting out of self-interest when it impairs its own contracts. The nature and weight of that interest should be analyzed not to determine the standard for reviewing the impairment but instead to determine whether the State can satisfy that standard. Here, for example, despite the State's disclaimer of financial self-interest, the State has regained primary control of some 9 million ounces of gold deposits. The State's response that it is under the same regulatory constraints that made these deposits "valueless" when held by Petitioners (Resp. 14) ignores that the State now holds the deposits in perpetuity and unlike private parties has the power to restore their value if and when it sees fit to do so.

The State concludes by arguing that applying heightened scrutiny to all State impairments of their own contracts would "prove unworkable" and undercut Justice Holmes's "observation that '[o]ne whose rights ... are subject to state restriction[] cannot remove them from the power of the State by making a contract about them.'" Resp. 17 (quoting *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908)). *Hudson* is inapposite because the State there had not impaired its own contract with the complaining party. There is nothing "unworkable" about holding a State to a higher standard – the standard expressly set forth in *United States Trust* – when it impairs its own contracts. *United States Trust* did not apply the Constitution "literally to proscribe 'any' impairment" (431 U.S. at 21), but simply required more searching review where the State's own contracts are the ones impaired.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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January 19, 2006.

(5)

No. 05-588

JAN 9 - 2006

OFFICE OF THE CLERK

In The
Supreme Court of the United States

SEVEN UP PETE VENTURE, an Arizona General Partnership, d/b/a SEVEN UP PETE JOINT VENTURE; CANYON RESOURCES CORPORATION, a Delaware Corporation; JEAN MUIR; DR. IRENE HUNTER; DAVID MUIR; ALICE CANFIELD; TONY PALAORO; JUNE E. ROTHE-BARNESON; AMAZON MINING COMPANY, a Montana Partnership; PAUL ANTONIOLI; STEPHEN ANTONIOLI; and JAMES E. JOSKINS,

Petitioners,

v.

THE STATE OF MONTANA,

Respondent.

On Petition For Writ Of Certiorari To The Montana Supreme Court

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Contracts Clause of the United States Constitution prevents a State from impairing its own contracts when the State denies that the impairment was in its financial self-interest.

2. Whether, regardless of the public purpose involved, the Contracts Clause of the United States Constitution prevents a State from impairing its own contracts.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of the Petitioners. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, membership public interest legal foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in almost every State of the country, including the State of Montana.

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief.

OPINIONS BELOW, JURISDICTION, AND STATEMENT OF THE CASE

Amicus hereby adopts Petitioners' description of the opinions below, statement of jurisdiction, and statement of the case. *See* Petitioners' Brief at 1-5.

SUMMARY OF THE ARGUMENT

This Court should grant *certiorari* in this case for two reasons. First, the Montana Supreme Court has interpreted an important federal question in a way that conflicts with relevant decisions of this Court and another State Supreme Court. Specifically, clarification is needed to determine the scope of a State's "self interest." Secondly, and more generally, this Court should seize this opportunity to reexamine the entire body of recent Contracts Clause jurisprudence since the current construction of the Clause differs so significantly from its original understanding.

ARGUMENT IN SUPPORT OF PETITION

I. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE, INCONSISTENT WITH U.S. SUPREME COURT PRECEDENT AND THE HOLDING OF ANOTHER STATE SUPREME COURT, THE MONTANA SUPREME COURT APPLIED DEFERENTIAL SCRUTINY TO A CONTRACT IMPAIRMENT AND, IN SO DOING, MATERIALLY HARMED PETITIONERS.

The Montana Supreme Court concluded that voter initiative I-137, later codified as Mont. Code Ann. § 82-4-390 (1998), constituted a substantial impairment of the

State of Montana's contract with Petitioners. *Seven Up Pete Venture v. Montana*, 114 P.3d 1009, 1022 (Mont. 2005). It further held, however, that this impairment did not violate the Contracts Clause of the U.S. Constitution because the impairment was reasonably related to a legitimate public purpose. *Id.* at 1025.

A. Inconsistent With U.S. Supreme Court Precedent And With The Holding Of Another State Supreme Court, The Montana Supreme Court Neglected To Apply The Heightened Scrutiny Standard When Montana Impaired Its Own Contract.

Although the text of the Contracts Clause[2] suggests that any contractual impairment is a *per se* violation of the Clause, more recent jurisprudence from this Court requires consideration of additional matters. *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934). For example, a State is given broad power to impair private contracts "for the general good of the public." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978). Additionally, when a State's own contract is impaired, it "may be constitutional if it is reasonable and necessary to serve an important public purpose." *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 26 (1977) (invalidating a State legislative action because the legislation impaired a State contract and violated the Contracts Clause). This Court has reasoned that this heightened scrutiny standard should be applied when a State impairs its own contracts "because a State's self interest is at stake." *Id.* at 25-26.

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[2] "No state shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1.

The Montana Supreme Court decided that heightened scrutiny ought not be applied here because the contractual impairment was allegedly not in the State's financial self-interest. *Seven Up Pete Venture*, 114 P.3d at 1023. This emphasis on "financial" self interest reveals a conflict amongst State Supreme Court jurisprudence, though it is in accord with various federal circuit courts. *See, e.g., Bailey v. North Carolina*, 500 S.E.2d 54, 66-67 (N.C. 1998) (determining that "complying with a Supreme Court ruling" constitutes a self-interest, thereby implicating the heightened scrutiny standard), *but see Mercado-Boneta v. Administracion Del Fondo De Compensacion*, 125 F.3d 9 (1st Cir. 1997) ("If the state has in fact altered none of its own financial obligations, then the legislative decision deserves significant deference because the state is essentially acting not according to its economic interests, but pursuant to its police powers."), and *Linton v. Commissioner*, 65 F.3d 508 (6th Cir. 1995) (legislative satisfaction of a district court ruling does not warrant heightened scrutiny when the State increased its own financial burden).

This Court, however, never limited the term "self-interest," as used in this context, to "financial self-interest." Instead, it held that "when we speak of governmental 'self-interest,' we simply mean to identify instances in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties." *U.S. v. Winstar Corp.*, 518 U.S. 839, 896 (1996) (plurality opinion). Indeed, the overarching "self-interest" behind the unconstitutional contract impairment in *U.S. Trust* is not simply the State's financial interests but also includes matters such as the improvement of mass transportation, energy conservation, and environmental protection. *U.S. Trust*, 431 U.S. 1. This Court has even stated that "[i]n almost every case, the Court has held a governmental unit

to its contractual obligations when it enters financial *or other markets.*" *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 413, n. 14 (1983) (emphasis added).

As such, Montana acted in its own interest by shifting the burdens that resulted from its adoption of I-137 from itself to Petitioners. Therefore, the Montana Supreme Court should have considered whether Montana's adoption of I-137 constituted an "important public purpose" that was both "reasonable" and "necessary." Because the Montana Supreme Court and, in similar contexts, various federal circuit courts have decided this important federal question in a way that conflicts with the decisions of this Court and another State Supreme Court, this Court should grant *certiorari* to clarify when heightened scrutiny ought to be applied to contractual impairments by a State.

B. Petitioners Have Been Materially Harmed Because Had Heightened Scrutiny Been Applied To The State's Contract, Which The State Impaired, Montana Would Have Violated The Contracts Clause.

Petitioners have been materially harmed because the Montana Supreme Court improperly applied a deferential standard to Montana's contract impairment instead of a heightened scrutiny standard. Under the heightened scrutiny standard, for a contract impairment not to violate the Contracts Clause that impairment must be reasonable and necessary to further an important public purpose. *U.S. Trust*, 431 U.S. at 25-26. Applying this standard, Montana violated the Contracts Clause by its purposeful impairment of its contract with Petitioners because none of the three criteria required by this Court was satisfied.

First, Montana's actions did not "serve an important public purpose." The Montana Supreme Court concluded that the purpose of the contractual impairment was to "protect the environment." *Seven Up Pete Venture*, 114 P.3d at 1023. Yet I-137 did not appear to "protect the environment" because the court itself admitted that "cyanide heap leaching has been shown to be safer than other methods of mining . . . " *Id.*

Second, Montana's actions were not "necessary." For the impairment to have been necessary, it must have been impossible to achieve Montana's goals without modifying the contract. *U.S. Trust*, 431 U.S. at 29-30. Here, I-137 expressly exempts from the ban mines operating prior to November 3, 1998. If the purported public interest of environmental protection could have been achieved without requiring other mines to abide by the cyanide-leaching prohibition, that interest would also likely have been achieved had Petitioners' contract been honored.

Finally, Montana's actions were not "reasonable." In *U.S. Trust*, 431 U.S. 1, this Court analyzed the repeal of parallel State statutes in New York and New Jersey that impaired the contracts between the States and certain bondholders in an attempt to further the goals of mass transportation, energy conservation, and environmental protection. This Court concluded that the States' action was unreasonable since the contract with the bondholders was formed in spite of the States' knowledge of these goals and the potential consequences:

> [T]he need for mass transportation in the New York metropolitan area was not a new development, and the likelihood that publicly owned commuter railroads would produce substantial deficits was as well known . . . It was with full

> knowledge of these concerns that the 1962 covenant [which the state of New York attempted to repeal] was adopted.

Id. at 31-32. Similarly, Montana, understanding the need to protect the environment, entered into a contract with Petitioners knowing that Petitioners intended to use a cyanide heap leaching method to extract minerals. *Seven Up Pete Venture*, 114 P.3d 1022.

In its analysis in *U.S. Trust*, this Court distinguished *City of El Paso v. Simmons*, 379 U.S. 497 (1965). There, the State's contractual impairment was held reasonable because, absent the government impairment, the private party would have realized benefits that were "hardly to be expected or foreseen." *Id.* at 515. Here, the Montana Supreme Court concluded that no "party, even one considered sophisticated, could have reasonably anticipated, at the time the agreement was entered in 1986, that Montana would enact the first state ban of this form of mining twelve years later." *Seven Up Pete Venture*, 114 P.3d at 1022. Therefore, unlike *Simmons*, the benefits that Petitioners would have realized were "expected [and] foreseen."

Thus, Montana's actions neither served an "important public purpose" nor were "reasonable" or "necessary." Because none of the three heightened scrutiny criteria were satisfied, Petitioners suffered a cognizable injury-in-fact, a Contracts Clause violation, that should have been redressed by the Supreme Court of Montana. That Court's failure to issue such a ruling, in accordance with this Court's ruling in *U.S. Trust*, necessitates the granting of this petition.

II. THE COURT SHOULD GRANT *CERTIORARI* TO CORRECT RECENT INTERPRETATIONS OF THE CONTRACTS CLAUSE, WHICH DEVIATE SUBSTANTIALLY FROM THE ORIGINAL UNDERSTANDING OF THE CONTRACTS CLAUSE.

Since 1934, this Court has substantially deviated from the original understanding of the Contracts Clause as it relates to the ability of a State to impair contracts. The Court should seize this opportunity to reject recent interpretations of the Clause, which are irreconcilable with the original, more intrinsically sound interpretation that the Contracts Clause is absolute.

A. Though This Court Ought To Give Great Deference To Precedent, It Should Reject Precedent That Is Irreconcilable With A Prior, More Intrinsically Sound Interpretation Of The Constitution.

"The doctrine of *stare decisis* is essential to the respect accorded to the judgments of this Court and to the stability of the law," *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (wherein the Court expressly overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986)); however, that doctrine is "not an inexorable command, particularly when . . . interpreting the Constitution." *Dickerson v. U.S.*, 530 U.S. 428, 443 (2000) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (expressly overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)); *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (abandoning a strict application of *stare decisis*). Instead, it is a mere "principle of policy." *Lawrence*, 539 U.S. at 577. Therefore, "[i]n prior cases, when this Court has confronted a wrongly decided, unworkable precedent calling

for some further action by the Court, [the Court has] chosen not to compound the original error, but to overrule the precedent." *Payne v. Tennessee*, 501 U.S. 808 (1991) (Souter, J., concurring) (wherein the Court partially overruled *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989)). Reconsideration of earlier decisions is particularly important in constitutional cases because in such cases "correction through legislative action is practically impossible." *Payne*, 501 U.S. at 828, citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting).

In the context of the Contracts Clause of the U.S. Constitution, *stare decisis* is merely a helpful, though not conclusive method of analysis, particularly when recent interpretations are erroneous. Thus, "[w]hile the Court has indicated that it must apply the Contract Clause 'with due respect for its purpose and the prior decisions of this court,' the value of precedent in this area is uncertain." *Legislative Alteration of Private Pension Agreements*, 92 Harv. L. Rev. 86, 88 (1978). Ultimately, recent Contracts Clause jurisprudence should be overruled if there is a "special justification" for doing so. *Dickerson*, 530 U.S. at 443.

B. A "Special Justification" Exists, And *Stare Decisis* Should Yield, When Recent Interpretations Differ From The Original Understanding Of A Clause Of The Constitution.

A "special justification" exists when recent case law differs from a prior, more intrinsically sound interpretation. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231 (1995) (discussing *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (the Court overrode *stare decisis* in its interpretation

of estate tax law). Interpreting the Constitution based on the original understanding of the text is the most intrinsically sound method of construction. This Court has consistently recognized the importance of the actual text of these founding documents. *See, e.g., State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59, 63 (1936) (finding no need to discuss the history of the Twenty-First Amendment, subsequent Court rulings interpreting the amendment, or statutes passed in reliance on the amendment because the language of the amendment is clear); *City of Boerne v. P.F. Flores*, 521 U.S. 507, 519 (1997) ("In assessing the breadth of § 5's [of the Fourteenth Amendment] enforcement power, we begin with its text."); *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (Curtis, J., dissenting) ("When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is according to their own views of what it ought to mean."). Indeed, "the text of our Constitution is the best guide to its meaning." *Granholm v. Heald*, ___ U.S. ___, 125 S. Ct. 1885, 1920 (2005) (Thomas, J., dissenting).

When interpreting the Constitution, "[t]he words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816). Specifically, "the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification." *Dickerson*, 508 U.S. at 379 (1993) (Scalia, J., concurring). To discern the original understanding of the

constitutional text, this Court must examine the contemporaneous understanding of the text, the historical perspective of the text, and the overall structure of the document. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989) (in praise of Chief Justice Taft's opinion in *Myers v. U.S.*, 272 U.S. 52 (1926)); *See also*, David F. Forte, *The Originalist Perspective, in The Heritage Guide to the Constitution* 15-16 (Edwin Meese III, *et al.*, eds., 2005). In fact, the Framers themselves applied similar interpretive methods. *Id.* As Justice Thomas explained, the purpose of this method of construction is threefold:

> First, it deprives modern judges of the opportunity to write their own preferences into the Constitution by tethering their analysis to the understanding of those who drafted and ratified the text. Second, it places the authority for creating legal rules in the hands of the people and their representatives rather than in the hands of the nonelected, unaccountable federal judiciary. Thus, the Constitution means not what the Court says it means, but what the delegates of the Philadelphia and of the state ratifying conventions understood it to mean. Third, it recognizes the basic principle of a written Constitution. We as a nation adopted a written Constitution precisely because it has a fixed meaning that does not change.

Clarence Thomas, *Judging*, 45 U. Kan. L. Rev. 1, 5 (1996).

Because originalism is the most intrinsically sound interpretation of the Constitution, a "special justification" for reversing precedent exists whenever there is a variance from the original understanding of the text. "When faced with a clash of constitutional principle and a line of

unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning." *Kelo v. City of New London, Conn.*, 125 S. Ct. 2655, 2687 (2005) (Thomas, J., dissenting).

C. This Court Should Reject Recent Contracts Clause Jurisprudence And, Instead, Adopt An Originalist Interpretation, Whereby Any Retrospective Impairment Of A Contract By A State Would Violate The Clause.

Recent Contracts Clause jurisprudence is divorced from the contemporaneous understanding of the text, the historical perspective of the text, and the overall structure of the Constitution.

1. The contemporaneous understanding of the text.

The meaning ascribed to the text by the Framers is a helpful, though not exclusive, resource in ascertaining the contemporaneous understanding of the text. Unfortunately, in the construction of the Contracts Clause, "the debates in the Constitutional Convention are of little aid." *Blaisdell*, 290 U.S. at 427.

Nonetheless, it appears certain that the Framers presumed the Contracts Clause was absolute and wholly independent of other alleged public purposes. The Clause was inspired by the Northwest Ordinance, which read, in part: "[N]o law ought *ever* to be made or have force in the said territory, that shall, *in any manner whatever*, interfere with or affect private contracts, or engagements *bona*

fide, and without fraud previously formed." Benjamin Fletcher Wright, *The Contract Clause of the Constitution* 8 (Greenwood Press, 1982) (1938), *citing* Max Farrand, *Record of the Federal Convention* (1911), II, 439; U.S.C.A. Northwest Ordinance (emphasis added); *see also*, Richard A. Epstein, *Obligation of Contract, in The Heritage Guide to the Constitution* 171 (Edwin Meese III, *et al.*, eds., 2005). Indeed, upon introduction of the Clause at the Constitutional Convention, Gouveneur Morris worried that such a clause would prevent States from passing necessary legislation:

> This would be going too far. There are a thousand laws, relating to bringing actions – limitations of actions which affect contracts. The Judicial power of the U. S. will be a protection in cases within their jurisdiction; and within the State itself a majority must rule, whatever may be the mischief done among themselves.

The Avalon Project at Yale Law School, *The Debates in the Federal Convention of 1787 reported by James Madison: August 28* (Nov. 18, 2005), *available at* http://www.yale.edu/lawweb/avalon/debates/828.htm.

In an address to the Maryland House of Delegates, another delegate to the Convention, Luther Martin, expressed concern that the Clause would preclude state legislation even in times of "great public calamities." *Blaisdell*, 290 U.S. at 461-62 (Sutherland, J., dissenting) (citing 1 *Elliot's Debates*, 344, 376, 377). Mr. Martin's statement is evidence that the Framers believed that the Contracts Clause is absolute.

Furthermore, in the years following the Constitutional Convention, contemporaries believed the Clause was absolute. At the Virginia Ratifying Convention in 1788, Patrick Henry explained that a public contract could not be altered or impaired, no matter how compelling the public need.

> How will this thing [the Contracts Clause] operate, when ten or twenty millions are demanded as the quota of this state? You will cry out that speculators have got it at one for a thousand, and that they ought to be paid so. Will you then have recourse, for relief, to legislative interference? They cannot relieve you, because of that clause. The expression includes public contracts, as well as private contracts between individuals. Notwithstanding the sagacity of the gentleman, he cannot prove its exclusive relation to private contracts. Here is an enormous demand, which your children, to the tenth generation, will not be able to pay. Should we ask if there be any obligation in justice to pay more than the depreciated value, we shall be told that contracts must not be impaired. Justice may make a demand of millions, but the people cannot pay them.

The Founders Constitution, *Debate in the Virginia Ratifying Convention* (Nov. 28, 2005), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_10_1s8.html.

Likewise, Alexander Hamilton reasoned, in 1796, that an impairment by a State legislature of a contract in which the State was a party was a *per se* violation of the Contracts Clause. Giving his opinion as to the constitutionality of a repeal of the sale of land from the State of Georgia to purportedly unscrupulous land companies, he wrote:

> Every grant from one to another, whether the grantor be a state or an individual, is virtually a contract . . . [and] the revocation of the grant by the act of the legislature of Georgia may justly be considered as contrary to the Constitution of the United States and, therefore null.

Wright, *supra*, 8, 22.

Later, in 1819, Daniel Webster, in a successful argument to this Court, asserted that the people, in ratifying the Constitution, wisely limited the ability of a State to impair contracts, even in times of apparent necessity. *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 598 (1819) (overturning an act by the New Hampshire legislature which impaired an existing contract). Similarly, in 1827, lawyer and court reporter Henry Wheaton argued that "the Convention intended to prohibit every possible mode in which the obligation of contracts might be violated by state legislation." *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827) (upholding a state bankruptcy statute because no contractual obligation was impaired). Chief Justice Marshall agreed with Wheaton on this point, and concluded that "[a] State is entirely forbidden to pass laws impairing the obligation of contracts." *Id.* at 335 (per Chief Justice Marshall). Conversely, in the 50 years following ratification of the Constitution, very few interpretations of the Contracts Clause limited its applicability. *See, e.g., id.* at 286 (per Justice Johnson). Ultimately, in 1977, this Court conceded that the Contracts Clause was originally understood as "an absolute bar to any impairment . . . " *U.S. Trust*, 431 U.S. at 19, n. 17.

2. The historical perspective of the text.

A careful analysis of the Contracts Clause's historical underpinnings also reveals its absolutism. It has been argued often that the Contracts Clause is not absolute because the sole purpose of the Clause was to protect the rights of Revolutionary War creditors. *See, e.g., Blaisdell*, 290 U.S. at 453-54 (Sutherland, J., dissenting); *Allied Structural Steel*, 438 U.S. at 257 (1978) (Brennan, J., dissenting). This interpretation ignores, however, the greater context in which the Constitutional Convention took place. Obviously, this was a period during which the Framers endeavored to establish a new, stable society. Many delegates were esteemed businessmen who believed that commerce was, in and of itself, a social good that was best cultivated through the freedom to contract. Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 703, 707 (1984). They desired, through the Contracts Clause, to "inspire a general prudence and industry, and give a regular course to the business of society." *The Federalist* No. 44 (J. Madison). *See also U.S. Trust*, 431 U.S. at 15 ("[T]he general purpose of the Clause was clear: to encourage trade and credit by promoting confidence in the stability of contractual obligations.").

In addition, the delegates at the state ratifying conventions viewed the Contracts Clause in a broader historical context. Edmund Randolph of Virginia supported the Clause because it prevented the fraud and injustice that had been perpetrated by state legislatures that had impaired contracts. *Blaisdell*, 290 U.S. at 462 (Sutherland, J., dissenting) (citing 3 *Elliot's Debates* 478). Charles Pinckney of South Carolina argued that the Clause was the very "soul of the Constitution," mandating that States "cultivate those principles of public honor and private

honesty which are the sure road to national character and happiness." *Blaisdell*, 290 U.S. at 462 (Sutherland, J., dissenting) (citing 4 *Elliot's Debates* 333).

Further, Chief Justice Marshall, in a majority opinion explaining the purpose of the Contracts Clause, wrote: "That anterior to the formation of the [C]onstitution, a course of legislation had prevailed in many, if not in all, of the states, which weakened the confidence of man in man, and embarrassed *all transactions between individuals*, by dispensing with a faithful performance of engagements." *Trustees of Dartmouth Coll.*, 17 U.S. at 628 (emphasis added). It is evident that, according to Justice Marshall, the Framers intended the Contracts Clause to be absolute.

Therefore, examination of the historical context indicates that the Framers intended to prohibit, absolutely, State impairment of all contracts, not merely debt contracts.

3. The overall structure of the Constitution.

Finally, the Constitution's structure mandates a strict interpretation of the Contracts Clause. A central objective of the Constitution is to limit accumulation of government power. This theme is inherent in the doctrine of enumerated powers, the checks and balances system, and the bicameral legislature of the federal government. More explicitly, this theme is also evident in the enumerated limitations on State government power, as listed in Article I, section 10. Although the first part of the Clause is specific, the second part is more general. To be sure, Clause 1 of that section prohibits States from coining money, emitting bills of credit, or making anything except gold or silver legal tender in the payment of debts. These

prohibitions evince a specific concern for the debtor-creditor relationship. Unlike these provisions, the rest of the Clause is written in far more general terms; States are generally prohibited from passing bills of attainder, *ex post facto* laws or "impairing the Obligation of Contracts." This suggests an application far broader in context than merely the debtor-creditor relationship.

Moreover, the structure of the Constitution indicates that no public purpose – not even an emergency – permits a State to impair the obligation of contracts. The Constitution specifically provides for certain exigencies. As Justice Sutherland wrote in his dissent in *Blaisdell*:

> The emergency of war furnishes an occasion for the exercise of certain of the war powers . . . The existence of another kind of emergency authorizes the United States to protect each of the states of the Union against domestic violence Const. art. 4, § 4 . . . [But unlike these clauses, the Contracts Clause] restricts every state power in the particular specified, no matter what may be the occasion. It does not contemplate that an emergency shall furnish an occasion for softening the restriction or making it any the less a restriction upon state action in that contingency than it is under strictly normal conditions.

Blaisdell, 290 U.S. at 473 (Sutherland, J., dissenting).

Simply put, the structure of the Constitution indicates that no State may impair the obligations of any contract, regardless of the type of contract or the public purpose.

4. Recent interpretations of the Contracts Clause and proposed solution.

In spite of the original meaning of the Contracts Clause, this Court has held, under the guise of the States' police power, that "the common weal" and "the general good of the public" are sufficient justifications for dispensing with the Contracts Clause. *Blaisdell*, 290 U.S. at 240. To that end, this Court pronounced that when a State's self-interest is at stake, a State's impairment of a contract "may be constitutional if it is reasonable and necessary to serve an important public purpose." *U.S. Trust*, 431 U.S. at 25. These interpretations so weakened the Contracts Clause that this Court found it necessary to remind the people that "the Contract Clause remains a part of our written Constitution" and "is not a dead letter." *Id.* at 16; *Allied Structural Steel*, 438 U.S. at 241. These recent interpretations also eroded the freedom to contract, a bedrock principle of a free society, and the originalism principles necessary to ensure a true rule of law.

In the past, when constitutional jurisprudence has strayed from the proper, original interpretation, this Court has not shirked its duty to correct the error. *See, e.g., Lawrence*, 539 U.S. 558; *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Payne*, 501 U.S. 808. Here, the Montana Supreme Court has reasoned that Petitioners' contract was impaired, yet, contrary to original interpretations of the Clause, it concluded that the impairment was constitutional. This Court should seize the opportunity to apply an originalist interpretation of the Contracts Clause, thereby reversing the judgment of the Montana Supreme Court and rectifying Contracts Clause jurisprudence hereafter.

CONCLUSION

Inconsistent with U.S. Supreme Court precedent and the holding of another State Supreme Court, the Montana Supreme Court applied deferential scrutiny to an impairment of its own contract. In addition, recent Contracts Clause jurisprudence of this Court has deviated substantially from the original, absolute interpretation of the Clause. Therefore, Mountain States Legal Foundation respectfully requests that this Court grant this Petition for *Writ of Certiorari* to correct these errors.

Respectfully submitted,

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